IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1115

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of Mario Lalli, Deceased,

Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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CITATIONS

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals, State of New York, entered on November 17, 1977, affirming on reconsideration ordered by this Court the decree of Surrogate's Court, Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates, Powers and Trusts Law § 4-1.2 is constitutional and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinion Below

The opinion of the Court of Appeals of New York on reconsideration is reported at — N.Y.2d — (Appendix A). The prior opinion of the Court of Appeals is reported at 38 N.Y.2d 77. The opinion of the Surrogate's Court of Westchester County is not reported (Appendix B).

Jurisdiction

This proceeding was commenced in the Surrogate's Court of Westchester County for a compulsory accounting by administratrix-widow on behalf of his sister and himself by decedent's son, who was born out of wedlock, without an order of filiation being granted within two years after birth and who was acknowledged as son by the decedent in a writing acknowledged before a notary and partially supported by the decedent during his lifetime. The Surrogate dismissed the proceeding and adjudged that the statute, Estates, Powers and Trusts Law § 4-1.2, denying the appellant the right to inherit from his father is constitutional. (Appendix B) On a direct appeal to Court of Appeals of New York on constitutional grounds, the decree of Surrogate Court was affirmed.

This Court vacated the judgment of the said Court of Appeals and remanded same for further consideration in light of *Trimble* v. *Gordon*, 430 U.S. 762 (1977). (No. 75-1148) On remand the Court of Appeals adhered to previous decision.

The judgment of the Court of Appeals of New York was entered on November 17, 1977: *Department of Banking* v. *Pink* (1942) 317 U.S. 264, 267-268; *Cole* v. *Violette*, (1943) 319 U.S. 581. Notice of Appeal was filed in Surrogate's Court, Westchester County on January 6, 1978. The jurisdiction of the United States Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Trimble* v. *Gordon* (1977) 430 U.S. 762. *Demorest* v. *City Bank Farmers Trust Co.* (1943), 321 U.S. 36.

Statute Involved

Estates, Powers and Trusts Law § 4-1.2, 17B, McKinney's Consolidated Laws of New York, 531-532, provides as follows:

§ 4-1.2 *Inheritance by or from illegitimate persons*

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion

must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Other Material Statutes

It is the juxtaposition of the above quoted statute with the other pertinent statutes, reflecting the public policy of New York that points up the discrimination complained of. Those statutes are:

1. Estates, Powers and Trusts Law § 5-4.4, 17B, McKinney's Consolidated Laws of New York, 932, as amended by 1975-1976 Pocket Part, page 146:

§ 5-4.4 *Distribution of damages recovered*

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at

such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.

(2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

(c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

2. Estates, Powers and Trusts Law § 4-1.1, 17B, McKinney's Consolidated Laws of New York, 476-477, as amended by 1975-1976 Pocket Part, pages 70-71:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

(1) A spouse and children or their issue, money or personal property not exceeding in value two thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes.

(2) A spouse and only one child, or a spouse and only the issue of one deceased child, money or personal property not exceeding in value two thousand dollars and one-half of the residue to the spouse, and the balance thereof to the child or to his issue per stirpes.

(3) A spouse and both parents, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to the parents. If there is no surviving spouse, the whole to the parents.

(4) A spouse and one parent, and no issue, twenty-five thousand dollars and one-half of the residue to the spouse, and the balance thereof to the parent. If there is no surviving spouse, the whole to the parent.

(5) A spouse, and no issue or parent, the whole to the spouse.

(6) Issue, and no spouse, the whole to the issue per stirpes.

(7) Brothers or sisters or their issue, and no spouse, issue or parent, the whole to the brothers or sisters or to their issue per stirpes.

(8) Grandparents only, the whole to the grandparents. If there are no grandparents, the whole to the issue of the grandparents in the nearest degree of kinship to the decedent per capita.

(9) Great-grandparents only, the whole to the great-grandparents. If there are no great-grandparents, the whole to the issue of great-grandparents in the nearest degree of kinship to the decedent per capita. Provided that in the case of a decedent who is survived by great-grandparents only, or the issue of great-grandparents only, such great-grandparents or the issue of such great-grandparents shall not be entitled to inherit from the decedent unless the decedent was at the time of his death an infant or an adjudged incompetent. Provided, further, that this subparagraph nine shall be applicable only to the estates of persons dying on or after its effective date.

(b) If the distributees of the decedent are in equal degree of kinship to him, their shares are equal.

(c) There is no distribution per stirpes except in the case of the decedent's issue, brothers or sisters and the issue of brothers or sisters.

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(e) Distributees of the decedent, conceived before his death but born alive thereafter, take as if they were born in his lifetime.

(f) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(g) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

3. Family Court Act § 517, 29A, Part 1, McKinney's Consolidated Laws of New York, 249:

§ 517. *Time for instituting proceedings*

(a) Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by furnishing support.

(b) If the petitioner is a public welfare official, the proceeding may be originated not more than ten years after the birth of the child.

4. Family Court Act § 417, 29A, Part 1, McKinney's Consolidated Laws of New York, 146:

§ 417. *Child of ceremonial marriage*

A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.

5. Domestic Relations Law § 24, 14, McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part, 28:

§ 24. *Effect of marriage on legitimacy of children*

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this act shall take effect or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding.

Question Presented

Does Estates Powers and Trusts Law § 4-1.2 providing that an illegitimate child is the legitimate child of his father only if an order of filiation is issued in a proceeding instituted in the lifetime of the father during pregnancy of the mother or within two years from the birth of a child in juxtaposition with other pertinent statutes reflecting public policy of New York violate Equal Protection and Due Process Clauses of Amendment XIV to the Constitution of the United States, in its application to a child born out of wedlock, for whom no order of filiation was entered and who was acknowledged by the deceased father as his son in a writing acknowledged before a notary and partially supported by him, by preventing such child from sharing in his father's intestate estate or proceeds of recovery in a wrongful death action against the confessed murderer of his father?

Statement

The decedent, Mario Lalli, was murdered on January 7, 1974 by one William Simpson, also known as William Lalli. He was married to Rosamond Lalli, the administratrix and appellee, about 34 years. Robert M. Lalli, the appellant, and his sister, Maureen Lalli were born respectively on August 24, 1948 and March 19, 1950, to the decedent and Eileen Lalli, who predeceased him. Robert M. Lalli, the appellant, was acknowledged by the decedent in a writing duly acknowledged before a notary and was supported by the decedent, who even bought a house "for Renee, his son Bobby, Renee's son Billy, and the other child that they were expecting."

There are no factual disputes. The appellant, Robert M. Lalli, and his sister, Maureen Lalli are natural children, born out of wedlock, and no order of filiation was ever entered.

On August 26, 1974 Robert M. Lalli, the appellant, filed a petition seeking a compulsory accounting and although the appellee originally answered, she thereafter served a notice of motion to dismiss on October 1, 1974 on the ground that under Estates, Powers and Trusts Law § 4-1.2 the appellant was not a distributee. The appellant opposed the application on the ground that the statute violated Equal Protection and Due Process Clauses of the XIVth Amendment and New York State Constitution, thus raising the federal question sought to be reviewed. The Surrogate granted the motion upholding the statute by the decree entered November 26, 1974 (Appendix D) The Court of Appeals affirmed by the final judgment entered November 25, 1975. This Court vacated said judgment and remanded for farther consideration in light of *Trimble* v. *Gordon,* 430 U.S. 762 (1977). On remand the Court of Appeals adhered to its prior decision by final judgment entered November 17, 1977.

The Federal Questions Are Substantial

The XIV Amendment reads in part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *"

This Court in *Trimble* v. *Gordon,* 430 U.S. 762, 770-771, said:

> "We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation

between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The Court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestate laws. Because it excludes these categories of illegitimate children unnecessarily, § 12 is constitutionally flawed."

In addition this Court clearly indicated acceptable guidelines, saying:

> "Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the State's interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. 772N. 14)"

In our case the fact pattern fits into the guidelines for we have an acknowledgment of paternity in writing duly acknowledged before a notary.

Yet the Court of Appeals, 5 to 2, contrary to the meaning of the language of this Court, persists in its extreme position that failure to secure an order of filiation imposes an impenetrable barrier and completely ignores reference by this Court to an acknowledgement, as is the fact in our case.

The dissenting opinion of Mr. Justice Cooke, joined in by Mr. Justice Fuchsberg (Appendix A) clearly expresses our position:

> "Our Statute considers no alternatives and imposes a sine qua non requirement that an order of filiation be obtained during the lifetime of the father (EPTL 4-1.2, sub [a] par [2]). For this reason, in light of Trimble, our statute fails to pass constitutional muster."

Furthermore, New York Statutes are not carefully tailored. On one hand under Domestic Relations Law sec. 24 a child born before or after a marriage is given all rights of a legitimate child even though the marriage is void or voidable whereas as to another child whose parents did not have a marriage ceremony there is provided no middle ground by Section 4-1.2 Estates, Powers and Trust Law. Certainly proof of a marriage after birth of a child is a much more inaccurate and inefficient way to establish paternity than an acknowledgement in writing duly acknowledged before a notary. There is no reason for the discrepancy except hostility to illegitimates.

Furthermore, under Section 517 of the Family Court Act New York legislature does recognize acknowledgement of paternity or support as sufficient to eliminate time bar to paternity proceedings. It is respectfully submitted that having considered either as sufficient for some purposes, it is not rational to consider both as in our case insufficient as proof of paternity.

CONCLUSION

For the reasons stated, appellant respectfully submits that the questions presented on this appeal are so substantial as to require reversal of the judgment below or plenary consideration, with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

HENKIN AND HENKIN
Counsel for Appellant

Of Counsel:
MORRIS R. HENKIN
LEONARD M. HENKIN

Appendices

APPENDIX A

Opinion of New York Court of Appeals

STATE OF NEW YORK COURT OF APPEALS

SURROGATE COURT

No. 560

In the Matter of

ROBERT M. LALLI,

Appellant,

vs.

ROSAMOND LALLI, as Administratrix &c of Mario Lalli, Deceased,

Respondent.

(560)

MORRIS R. HENKIN & LEONARD M. HENKIN,
Mt. Vernon,
for appellant,

LEONARD A. WEISS,
Mt. Vernon,
for respondent.

JONES, *J.*

This case is now before us on remand from the Supreme Court of the United States for further consideration in the light of *Trimble* v. *Gordon* (430 U.S. ——). We adhere to our previous decision (38 N.Y.2d 77).

At the outset we observe that the standard to be applied in our review, while "less than strictest scrutiny", is nonetheless "not a toothless one" (perhaps in the sense that it

would be a "toothless" standard if it could be satisfied by a mere finding of some remote rational relationship between the statute and a legitimate state purpose) (430 U.S. ——).

We find the Illinois statute which was before the Court in *Trimble* significantly and determinatively different from the New York statute. Under the former the right of an illegitimate child to inherit from his father depended not only on proof, by way of the father's acknowledgement, of the fact of paternity, but on proof as well that the parents had intermarried (Ill. Rev. Stat. ch 3, § 12 [1961]; cf. Ill. Rev. Stat. ch 3, § 2-2 [1976-1977 Supp.]). By contrast, under our New York statute the right to inherit depends only on proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father (Estates, Powers and Trusts Laws. § 4-1.2, subd [a], par [2]).[1]

In our analysis the Illinois statute focuses on a requirement that the family relationship be "legitimatized" by the subsequent marriage of the parents. Thus, there was a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there were no doubt whatsoever as to paternity.[2] The Supreme Court held unacceptable

[1] As we noted when this case was initially before us, inasmuch as we uphold that provision of the statute which forecloses this appellant's claim to status as a distributee because no order of filiation was made during the lifetime of his father, we do not reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (EPTL 4-1.2, subd [a], par [2]; 38 NY2d 80, fn).

[2] We observe that this appears to have been the case in *Trimble* itself. A paternity order had been entered during the lifetime of the father finding Gordon to be the father of the child, Deta Mona (430 US ——). On the facts there would have been no question but what Deta Mona would have been entitled to inhert from her father under the New York statute.

such a statutory provision which penalized children born of an "illegitimate relationship" between their parents—concluding that the sins of the parents are not to be visited upon their children. There is nothing similar in our statute; it is concerned only with proof of paternity and the establishment of a blood relationship between the father and the child.

In another aspect we note that even with respect to the issue of paternity there is a different emphasis in the two statutes. Illinois requires in a conclusory form only that the child be "acknowledged by the father as the father's child". New York, on the other hand, is evidently concerned not only with the fact of paternity but with the form and manner, and thus the availability, of its proof, i.e., by order of filiation.

The Supreme Court explicitly recognized the inherently more difficult problems of proof of paternity than of maternity and acknowledged that the states have a legitimate interest in making provision for the orderly settlement of estates and the dependability of titles to property passing under intestacy laws (430 U.S.).

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." (430 U.S.).

The issue here appears to turn, then, on whether a state may constitutionally require as proof of paternity a judicial determination made during the lifetime of the father. We find nothing in *Trimble* which forecloses this possibility; specifically we do not, as appellant would have us, read footnote 14 at page as forbidding such a requirement The preference for judicial determinations with respect to title to real property has a long and respected history and provides an available record. In effect our statute requires that the determination of paternity be made in the formality of a judicial proceeding in consequence of which there will follow an order of filiation and a permanent, accessible record. If a father is prepared to execute a formal acknowledgment of paternity (a prerequisite which appears clearly to be acceptable to the Supreme Court), obtaining an order of filiation will not be burdensome. Nor do we perceive the seeds of constitutional infirmity in the requirement that the judicial determination be made within the lifetime of the father. As we noted before, the father "may be expected to have a greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process." (38 NY2d 82.) Indeed a formal acknowledgment of paternity, apparently found in *Trimble* to be an acceptable requirement, obviously entails personal participation by the father during his lifetime.

Finally, we would merely note, if *Trimble* is to be read as inviting exploration of the intent of the Legislature in adopting the particular statute, that research of counsel as well as our own has disclosed no relevant materials with respect to the enactment of § 4-1.2(a)(2). We could speculate as to the details of legislative intentions, and so could

others. To us it is clear, even in the absence of specific legislative materials, that this statute serves a legitimate state purpose—in the language of *Trimble,* to make provision for "the orderly settlement of estates and the dependability of titles to property passing under intestacy laws". We know of nothing, and there is nothing in the record, to suggest that our statute was intended as a moral, ethical or social disparagement of illegitimacy or was the product of proponents whose objective, even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms.

For the reasons stated we conclude that our statute meets the constitutional guidelines articulated in *Trimble.* Accordingly, the decree of Surrogate's Court, Westchester County, should be affirmed, with costs.

COOKE, *J.* (dissenting):

Admittedly, the Illinois statute recently declared unconstitutional by the Supreme Court of the United States is significantly different from the New York statute (EPTL, 4-1.2, subd [a], part [2]). Nevertheless, it is respectfully submitted that our statute is likewise unconstitutional in light of *Trimble* v. *Gordon* (430 U.S. 762).

In *Trimble,* the Supreme Court was careful to delineate the boundaries of its inquiry, thus explaining that

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a con-

> stitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance (430 U.S. at p. 771).

The Court also recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally" (Id. at p. 770). Nevertheless, considering the Illinois statute, the court reasoned:

> We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed (Id. at pp. 770-771).

Furthermore, concerning the interests of the states in the accurate and efficient disposition of property, the Court commented:

> Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. at p. 772, n. 14).

Applying the equal protection analysis employed by the Supreme Court in *Trimble* necessitates consideration of the relation of our statute to our State's "proper objective of assuring accuracy and efficiency in the disposition of property at death" (430 U.S. at p. 770). Of course, our statute is not mindless nor totally irrational and a concern for solid proof of paternity is a legitimate state purpose. But if the court is now required to put teeth into its scrutiny, we are obliged to go beyond the purpose of the statute to a consideration of the rationality of the burden it places on the State's illegitimate children.

A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, *ipso facto*, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often result simply from the fact that the putative father is supporting and acknowledging the children as

his own. Or, it might well be and often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.

The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Court Act, § 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in the eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of *Trimble* it must be concluded that the statute leaves the "middle ground" of what a state may legitimately require and settles on the side of complete exclusion.

In *Trimble,* the Supreme Court reasoned that a paternity order obtained for purposes of requiring the father to provide support should be sufficient to establish paternity

for purposes of allowing an illegitimate child to inherit from a father who dies intestate (see 430 U.S. at p. 772).* However, the Court did not suggest that this is the only method for making this determination. Our statute considers no alternatives and imposes a sine qua non requirement that an order of filiation be obtained during the lifetime of the father (EPTL, 4-1.2, subd [a], par [2]). For this reason, in light of *Trimble,* our statute fails to pass constitutional muster.

Accordingly, if paternity is established, the petition for an accounting should be granted.

* * * *

Upon reargument: Prior determination of this court affirming the decree of the Surrogate's Court adhered to, with costs. Opinion by Jones, J. All concur except Cooke, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

Decided November 17, 1977

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* This pronouncement by the Supreme Court warrants this observation. This Court does not "reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted 'during the pregnancy of the mother or within two years from the birth of the child' " because in this matter no order of filiation was made during the lifetime of the father (see slip opn, p 2, n 1). Nevertheless, it is difficult to ignore the fact that under our statutory scheme a public welfare official may institute a proceeding within 10 years of the birth of the child (Family Court Act, § 517, subd [b]) for purposes of requiring the father to provide support, and yet the order of filiation emanating from such proceeding would not allow the child to inherit from his or her father unless said proceeding was instituted within two years of the birth of the child (EPTL, 4-1.2, subd [a], par [2]; see *Matter of Flemm,* 85 Misc2d 855, 862).

APPENDIX B

Opinion of Surrogate's Court Westchester County

SURROGATE'S COURT

WESTCHESTER COUNTY

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of

MARIO LALLI,

Deceased,

to render and settle her accounts as such Administratrix.

HENKIN, HENKIN & QUINN,
Attorneys for Petitioner

MURIEL LAWRENCE,
Attorney for Respondent

BREWSTER—S.

This is a motion to dismiss a petition for a compulsory accounting on the ground that the petitioner, an illegitimate person, has no status as a distributee to compel an accounting. Petitioner attacks the constitutionality of the statute on descent and distribution of a decedent's intestate property as it applies to illegitimate issue on the grounds that it is a denial of equal protection under the Constitution of the United States (Fourteenth Amendment) and the Constitution of the State of New York (Article I, §11).

Decedent died on January 7, 1973. The mother of petitioner predeceased the decedent. The constitutional issue was initially raised on the application by an alleged son for letters of administration. However, no determination was made at that time since the widow who had a prior right to letters, duly qualified and was appointed administratrix on December 26, 1973.

The petitioner in this compulsory accounting proceeding states that he and his sister are children of decedent; were born out of wedlock; and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them. They do state, however, that they were supported, in part, by the decedent during his lifetime. Petitioner and his sister claim to be lawful distributees of the decedent together with decedent's widow. They further claim that EPTL §4-1.2(2) which would deny them a share in the estate of decedent as distributees by reason of their illegitimacy without an order of filiation having been made during the life of the father declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child, is unconstitutional and therefore void. The motion by the administratrix to dismiss the petition relies on the constitutionality of the aforesaid statute, asserting that even if the proof is offered which establishes that decedent was the father of petitioner and his sister or contributed to their support, nevertheless they are not distributees by virtue of the statute and petitioner has no status to compel an accounting by the administratrix.

This is not a novel issue. The exclusion of illegitimates, as distributees under various state statutes has already

been considered by the courts. In recent years the United States Supreme Court has on three separate occasions considered the constitutionality of the complex set of rules regarding the rights of illegitimate children in the statutes of the State of Louisiana. In the case of Levy v. Louisiana, 391 U. S. 68, the denial of the right of an illegitimate child to recover damages for the wrongful death of his mother was declared unconstitutional. In a second case, Glona v. American Guarantee, 391 U. S. 73, the Louisiana statute that denied the right of a mother to recover damages for the wrongful death of her illegitimate child was also declared unconstitutional. Next was decided the case of Labine v. Vincent, 401 U. S. 532, in which the right of the State of Louisiana to make laws for distribution of property, even to the exclusion of illegitimates, was upheld as constitutional. After considering the restrictive provisions under Louisiana law with respect to illegitimates, the Court held:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collat-

eral relations, as opposed to ascendants, and against ascendants, as opposed to descendants.

• • • • •

"It may be possible that some of these choices [of distribution of an intestate's property] are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. • • • We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." Labine v. Vincent, supra, pp. 537-539.

The New York law on inheritance by or from illegitimate persons is set forth in EPTL §4-1.2 which provides in part as follows:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation

declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) • • • • • •"

This statute has been somewhat eroded by constitutional attacks made upon some of its provisions as applicable to certain types of cases. In so far as the statute would limit and restrict the rights of illegitimate children who have suffered pecuniary injuries to share in the distribution of damages recovered in an action for the wrongful death of their putative father, it has been declared unconstitutional (Matter of Ortiz, 60 Misc 2d 756). But even in the Ortiz case it was pointed out that the Legislature may in its absolute discretion designate one class of beneficiaries to inherit and another class to receive the damages for wrongful death. Referring to the equal protection clauses of the U. S. Constitution (Fourteenth Amendment) and the Constitution of the State of New York (Article I §11) the court said:

"These provisions do not forbid unequal laws and do not require every law to be equally applicable to all persons (Barbier v. Connolly, 113 U. S. 27). Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably—reasonably being measured in terms of a proper legislative purpose." p 759.

Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the court further stated:

"But some difference does exist in such relationships at least with respect to the greater difficulty in ascertaining paternity. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy. To the mother however, the birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is a child of a particular woman is rarely difficult to prove. Proof of paternity on the other hand as experience has shown is a much more difficult problem.

• • • • •

"It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate *inheritance* from the father. In such a statute the illegitimates' rights often come into direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin." Matter of Ortiz, supra, p. 761.

The constitutionality of the restrictions limiting illegitimates to inherit from their father in certain cases only was considered in Matter of Crawford, 64 Misc 2d 758. The court stated at page 763:

". . . It is urged that this limitation creates an arbitrary classification as to infants, where there is no filiation order within two years from the date of birth. The test to be applied 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without much basis.' (Truax v. Corrigan, 257 U. S. 312, 337; Matter of Posner v. Rockefeller, 31 A D 2d 352.)

"The limitations upon the right of an illegitimate child to inherit from its father are set forth in absolute fashion in the statute. The two-year limitation provision is not akin to the Statute of Limitations found in section 517 of the Family Court Act but rather it establishes a 'rule of substantive law, a statute prerequisite • • • a condition precedent' to the qualification of the infant as a distributee under EPTL 4-1.2.

"The legislative intent is clear on this point: 'Since inheritance from the father of an illegitimate has always been intertwined with proof of paternity, it is recommended that only a limited right of inheritance from the father be permitted. The child is only permitted to inherit from the father where a court of competent jurisdiction (which under present law in most cases will be the Family Court) has made an order declaring paternity during the lifetime of the father in a proceeding commenced within two years after the birth of the child.' (Fourth Report of Temporary State Comm. on Law of Estates, 1965, p. 37; N. Y. Legis. Doc., 1965, No. 19.)

"Such limitations are not arbitrary or capricious, but were adopted by the Legislature to avoid post-

death litigation. (Matter of Consolazo, 54 Misc 2d 398; Matter of ABC v. XYZ, 50 Misc 2d 792; Matter of Middlebrooks v. Hatcher, 55 Misc 2d 257.)"

Matter of Hendrix, 68 Misc 2d 439 considered anew the constitutionality of EPTL §4-1.2 and after a full discussion of the many cases involving the same concluded "that the New York statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate". p. 444. In Matter of Bolton, 70 Misc [2] 814, the court reconsidered the statute anew, reaffirmed its constitutionality and despite the fact that decedent had admitted paternity in an affidavit, it held that only full compliance with the provisions of EPTL §4-1.2 could entitle an illegitimate child to inherit from the putative father. The court stated: "It is for the Legislature and not the court to overcome the restrictive elements of this statute." p. 819.

Cases involving wrongful death cited by the petitioner in which limiting provisions of the statute were voided as unconstitutional are not determinative of the issue here. As pointed out by the court in Labine v. Vincent, supra, p. 536:

> "The cause of action alleged in Levy was in tort. The court held that the state could not totally exclude the illegitimate children who were unquestionably injured by the tort. Levy did not say that a state can never treat an illegitimate child differently from legitimate offspring."

The Supreme Court of New Jersey clearly pointed out the distinguishing elements in the claims of illegitimates to damages for wrongful death of a putative father as opposed to inheritance from a decedent. In Schmoll v. Creecy, 54 N. J. 194, the court stated:

> ". . . There are of course differences between a wrongful death statute and an inheritance statute. A wrongful death statute itself determines who shall benefit, and the decedent has no voice in the matter. On the other hand, an inheritance statute embodies no more than the presumed intention of decedents who do not express their wish. It may therefore be urged that our inheritance statute does not generate a distinction between legitimate and illegitimate children but merely reflects the probable intent of individuals who are themselves constitutionally free to draw that line and who presumptively subscribe to the view of the statute by omitting to direct otherwise by will. Then, too, at least in the case of a male decedent, there is fear of spurious claimants, a problem more formidable in estate situations than in wrongful death actions in which the amount of the recovery will depend critically upon the amount of pecuniary injury shown."

Finally, the court observes that while the limitation in EPTL §4-1.2 on bringing an action to declare paternity within two years from the birth of the child has been declared unconstitutional as an irrational discrimination between two classes of individuals, namely public welfare officials and others (Wales v. Gallan, 61 Misc. 2d 831), nevertheless the requirement that it be done during the lifetime of the father, giving him a chance to contest the same, is

obviously a rational requirement and constitutionally sound. The attempt to prove paternity at this date comes too late.

Accordingly, the court determines that EPTL §4-1.2 is applicable to the alleged son of decedent, that he is not a distributee of the decedent herein and that he lacks status to petition for a compulsory accounting by the administratrix. The motion to dismiss is granted.

Settle order.

November 15, 1974

EVANS V. BREWSTER
Surrogate

APPENDIX C

Order of Affirmance of New York Court of Appeals

COURT OF APPEALS—STATE OF NEW YORK

THE HON. CHARLES D. BREITEL,
Chief Judge, Presiding

No. 560

—o—

In the Matter of

Robert M. Lalli,

Appellant,

vs.

Rosamond Lalli, as Administratrix &c. of Mario Lalli, Deceased,

Respondent.

—o—

The appellant in the above entitled appeal appeared by Henkin & Henkin; the respondent appeared by Avstreih, Martino & Weiss; and Louis J. Lefkowitz, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that upon reargument: Prior determination of this court affirming the decree of the Surrogate's Court adhered to, with costs. Opinion by Jones, J. All concur except Cooke, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate Court, Westchester County, there to be proceeded upon according to law.

Appendix C

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
November 17, 1977

APPENDIX D

Decree of Surrogate's Court Westchester County

At the Surrogate's Court, held in and for the County of Westchester, at the County Courthouse, White Plains, New York, on the 26th day of November 1974.

Present:

HON. EVANS V. BREWSTER,
Surrogate.

Index #1760/73

In the Matter of the Petition of ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the estate of Mario Lalli, deceased, to render and settle her accounts as such Administratrix.

ROBERT M. LALLI, residing at 135 Daisy Farm Drive, in the City of New Rochelle, County of Westchester, State of New York, having petitioned the Surrogate's Court of the County of Westchester to compel Rosamond Lalli, Administratrix of the goods, chattels and credits of Mario Lalli, deceased, who at the time of his death resided at 415 Gramatan Avenue, in the City of Mount Vernon, County of Westchester, to render and settle her account as such Administratrix, by a petition duly verified August 23, 1974, and a citation having duly issued thereon returnable on the 20th day of September, 1974, and said Rosamond Lalli having answered said petition by an answer duly verified September 16th, 1974, and having thereafter moved by a

notice of motion dated October 1, 1974, supported by the affidavit of Rosamond Lalli sworn to October 1, 1974, to dismiss the petition of said Robert Lalli on the ground that neither Robert Lalli nor his sister, Maureen Lalli, are distributees of decedent's estate under provisions of EPTL 4-1.2 and the petitioner having submitted an affidavit sworn to October 10, 1974, together with exhibits thereto attached, and affidavit of Rosetta Vollmer Ammirata sworn to October 10, 1974, in opposition thereto, and said Rosamond Lalli having submitted a reply affidavit sworn to October 23, 1974, and said application having come up to be heard on the 25th day of October, 1974, and after hearing Muriel Lawrence, Esq., attorney for the respondent, in support of the application, and Henkin, Henkin and Quinn, Esqs. (Leonard M. Henkin, Esq. of counsel), attorneys for the petitioner, in opposition thereto, and upon reading all of the aforesaid and due deliberation having been had, and the Surrogate having rendered a decision dated November 15, 1974, sustaining the constitutionality of EPTL 4-1.2 in its application to the petitioner and his sister herein, as against their claim that said section is unconstitutional, in application to them

Now, it is

ORDERED, ADJUDGED AND DECREED, that EPTL 4-1.2 is constitutional as applicable to the petitioner herein, and that by reason thereof petitioner is not a distributee of the decedent herein and that he lacks status to petition for compulsory accounting by the Administratrix, and it is further

ORDERED, ADJUDGED AND DECREED, that the petition herein be and the same is hereby dismissed.

EVANS V. BREWSTER
Surrogate

APPENDIX E

Notice of Appeal to United States Supreme Court

SURROGATE'S COURT

WESTCHESTER COUNTY

No. 560

—o—

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

To Compel ROSAMOND LALLI as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

TO RENDER AND SETTLE HER ACCOUNT AS SUCH ADMINISTRATRIX.

—o—

NOTICE is hereby given that ROBERT M. LALLI, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals, State of New York, affirming the decree of Surrogate's Court, Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates Powers and Trusts Law § 4-1.2 is constitutional, entered on November 17, 1977.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

HENKIN AND HENKIN
Attorneys for Appellant
22 West First Street
Mount Vernon, New York 10550
(914) 668-2300

Appendix E

(Filed Surrogate's Court Jan. 6, 1978
Westchester County Clerk)

STATE OF NEW YORK
COUNTY OF WESTCHESTER
SURROGATE'S OFFICE } ss:

I, Philip E. Pugsley, Chief Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of Notice of Appeal, Re: The Estate of Mario Lalli, Deceased. Filed: January 6, 1978 with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original.

Dated and Sealed January 6, 1978

PHILIP E. PUGSLEY
Philip E. Pugsley
Chief Clerk of the
Surrogate's Court

[SEAL]

Affidavit of Service

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

LUCILLE GREENBERG, being duly sworn, deposes and says, that she is not a party to the action, is over 18 years of age and resides at 93 Beaumont Circle, Yonkers, New York, that on January 6, 1978, deponent served the within Notice of Appeal to United States Supreme Court upon

1) Avstreih, Martino & Weiss

2) Muriel Lawrence
Esqs., Attorneys for Respondent

3) Honorable Louis J. Lefkowitz, Attorney General of the State of New York, Irwin M. Strum, Assistant Attorney General

by depositing a true copy of same enclosed in a post paid properly addressed wrapper in a post-office or official depository under the exclusive care and custody of the United States Postal service within the State of New York, with the postage thereon prepaid addressed to said attorneys at their office

1) 20 East First Street
Mount Vernon, New York 10550
(Substituted Attorneys on Appeal for Respondent)

2) 19 Gramatan Avenue
Mount Vernon, New York 10550
(Original Attorney for Respondent)

3) Two World Trade Center
New York, New York 10047
(Department of Law)

Affidavit of Service

that being the addresses designated on the last papers served by said attorneys.

LUCILLE GREENBERG
Lucille Greenberg

Sworn to before me this 6th
day of January, 1978

MORRIS R. HENKIN
Morris R. Henkin
Notary Public, State of New York
No. 60-6573350
Qualified in Westchester County
Commission Expires March 30, 1978

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1115

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

To Compel Rosamond Lalli as Administratrix of the Estate of

MARIO LALLI, Deceased,

Appellee.

To render and settle her account as such Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPENDIX

Docketed February 8, 1978
Probable Jurisdiction Noted March 20, 1978

INDEX TO APPENDIX

Chronological List of Relevant Docket Entries

December 26, 1973.

Letters of Administration issued to respondent Rosamond Lalli, as Administratrix of the Estate of Mario Lalli, Deceased.

August 26, 1974.

The appellant, Robert M. Lalli, filed a petition for a compulsory accounting by the Administratrix and citation issued to her to show cause.

September 16, 1974.

The respondent filed a verified answer to the petition.

October 1, 1974.

The respondent filed a notice of motion to dismiss the petition.

November 26, 1974.

The Surrogate entered a decree dismissing the petition.

November 26, 1974.

The appellant filed a notice of direct appeal to Court of Appeals on constitutional grounds.

November 25, 1975.

The Court of Appeals affirmed the decree of Surrogate's Court, Westchester County, 38 N.Y. 2d 77.

Chronological List of Relevant Docket Entries

January 23, 1976.

The appellant filed with the Clerk of Surrogate's Court Notice of Appeal to the Supreme Court of the United States.

May 16, 1977.

The Supreme Court of the United States vacated the judgment of the Court of Appeals and remanded the case to it for further consideration in light of Trimble v. Gordon, 430 U.S. 762, 431 U.S. 911.

June 1, 1977.

Attorney General of the State of New York made a party pursuant to section 71 of the Executive Law of New York.

November 17, 1977.

The Court of Appeals 5 to 2 adhered to its prior determination, 43 N.Y. 2d 65.

January 6, 1978.

The appellant filed with the Clerk of Surrogate's Court notice of appeal to the Supreme Court of the United States.

February 8, 1978.

Jurisdictional statement docketed.

March 20, 1978.

Probable Jurisdiction Noted.

Petition

SURROGATE'S COURT

COUNTY OF WESTCHESTER

File No. 1760—1973

—0—

In the Matter of the Petition of

ROBERT M. LALLI

to compel ROSAMUND LALLI as the Administratrix of the Estate of MARIO LALLI, deceased to render and settle her accounts as such Administratrix.

—0—

To the Surrogate's Court of the County of Westchester:

The petition of Robert M. Lalli residing at 135 Daisy Farm Drive in the City of New Rochelle, County of Westchester, State of New York respectfully shows:

That on the 26th day of December, 1973 Letters of Administration of the goods, chattels and credits of Mario Lalli, deceased who at the time of his death resided at 415 Gramatan Avenue, in the City of Mount Vernon, County of Westchester and State of New York, were granted to Rosamund Lalli and that more than seven months have elapsed since said appointment.

That more than fifteen days have elapsed after the time in which to present claims has expired.

That the said Rosamund Lalli not rendered any account of her proceedings as such Administratrix.

That your petitioner and his sister Maureen Lalli are interested in the estate of said deceased as natural children born out of wedlock, who have been supported by decedent

Petition

and your Petitioner having been acknowledged as son, in writing.

That there are no other persons than those mentioned interested in the application.

Wherefore your petitioner prays for a judicial settlement of the accounts of Rosamund Lalli as such Administratrix and that the said Rosamund Lalli may be cited to show cause why she should not render and settle such account.

Dated August 23rd, 1974.

ROBERT M. LALLI,
Petitioner.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

ROBERT M. LALLI, being duly sworn, deposes and says that he is the petitioner in this proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ROBERT M. LALLI

(Jurat omitted in Printing)

Verified Answer and Objection of Administratrix on Compulsory Accounting.

SURROGATE'S COURT

COUNTY OF WESTCHESTER

In the Matter of the Petition of

ROBERT M. LALLI, to compel ROSAMOND LALLI, as the Administratrix of the Estate of MARIO LALLI, deceased, to render and settle her acounts as such Administratrix.

ROSAMOND LALLI, as Administratrix of the goods, chattels and credits of Mario Lalli, deceased, answering the petition filed herein on the 23rd day of August 1974, for a compulsory judicial settlement of the account of the said administratrix, does hereby allege and object as follows:

1. On the 26th day of December 1973, letters of administration of the goods, chattels and credits of Mario Lalli, deceased, were duly issued to respondent by this court, and she thereupon duly qualified and thereafter acted and is still acting as such administratrix.

2. That she denies the allegations of the petition that Robert M. Lalli and Marleen Lalli, or either of them, are the natural or acknowledged children of the deceased.

3. That neither Robert M. Lalli, nor Marleen Lalli are distributees of the deceased and may not inherit any part of his estate pursuant to EPTL 4-1.2 and have no status herein to demand a judicial settlement of the administratrix's accounts.

4. That respondent does not desire to file an account at this time or until a final judicial determination is made determining the status of petitioner and his sister and

Verified Answer and Objection of Administratrix on Compulsory Account

that she is not the sole beneficiary of said estate. A formal accounting may not be necessary and she seeks to avoid its expense. Also the estate has a claim against the petitioner for $10,784.99 with interest which is contested and should be determined before the final accounting is made.

Further, the estate is not ready at this time to make a final accounting and has not filed the New York State Return.

WHEREFORE, respondent prays that a judicial determination be had of the status of the petitioner and his sister, Marleen Lalli, determining their right to share in the decedent's estate as a preliminary step in the fiduciary accounting proceeding.

Dated: Mount Vernon, N. Y.
September 18, 1974

ROSAMOND LALLI

MURIEL LAWRENCE
Attorney for the Administratrix
Office & P. O. Address
19 Gramatan Avenue
Mount Vernon, N. Y. 10530
914—MO 7-7383

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

ROSAMOND LALLI, being duly sworn deposes and says that she is the respondent in the above action. That she has read the answer herein and knows the contents thereof, that the same is true to her knowledge except as to those matters therein alleged on information and belief and as to them she believes it to be true.

ROSAMOND LALLI

(Jurat omitted in Printing)

Affidvait of Rosamond Lalli

SURROGATE'S COURT

COUNTY OF WESTCHESTER

—0—

In the Matter of the Petition of

ROBERT M. LALLI, to compel ROSAMOND LALLI as the Administratrix of the Estate of MARIO LALLI, deceased, to render and settle her accounts as such Administratrix.

—0—

ROSAMOND LALLI, being duly sworn, deposes and says:

1. She submits this affidavit in support of her motion to dismiss the petition of Robert Lalli for compulsory accounting because he does not have status to make this application pursuant to EPTL 4-1.2 and neither he nor his sister, Maureen Lalli, are distributees of deponent's husband's estate.

2. That respondent was appointed Administratrix of her husband's estate after having been duly qualified on December 26th, 1973. She is the widow of the decedent. That she and the decedent were married about 34 years. That they shared the same home and bed from the time of their marriage until he met his violent death on or about January 7th, 1973. That following her marriage she never had employment and was completely dependent upon the decedent for her total support and she remains dependent upon the assets of her husband's estate for her continuing support.

3. That respondent and her late husband had no children and neither had more than the one marriage. She is his sole distributee.

Affidavit of Rosamond Lalli

4. That petitioner refers to himself and his sister as illegitimate children of the decedent, born out of wedlock who were supported by decedent, and petitioner further alleges that he was acknowledged as the decedent's son in writing.

5. In the previous motion papers in this matter, the petitioner has stated that he and his sister are the children of a woman now deceased and that no order of filiation was ever issued.

6. That both petitioner and his sister are in their mid twenties and are self-supporting.

7. In a prior motion petitioner annexed to his moving papers a photostat of consent to his marriage, which he says was signed by the decedent, acknowledging him to be his son. It is believed that this is relied upon by him as the basis for his allegation in his petition that he was "acknowledged" in writing as the son. It is respectfully contended that this document is not the equivalent of a filiation order nor is it an acknowledgement of paternity as it is signed by one claiming to be the guardian of the infant where both of his parents are dead.

8. If EPTL 4-1.2 is valid, then paternity is irrelevant, and there is no need for a trial of the issue of paternity. Neither petitioner nor his sister have status to require a compulsory accounting nor do they have any interest in decedent's estate. Matter of Hendrix (68 Misc. 2d 439).

WHEREFORE, deponent prays for an order dismissing the petition of Robert Lalli for compulsory accounting and for the determination of this Court that neither he nor his sister, Maureen Lalli, are the distributees of the decedent's estate and for such other and further relief as to this Court shall be just.

ROSAMOND LALLI

(Jurat omitted in Printing)

Answering Affidavit of Robert M. Lalli

SURROGATE'S COURT

COUNTY OF WESTCHESTER

File No. 1760—1973

In the Matter of the Petition of

ROBERT M. LALLI, to compel ROSAMOND LALLI as the Administratrix of the Estate of MARIO LALLI, deceased, to render and settle her accounts for such Administratrix.

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

ROBERT M. LALLI, being duly sworn, deposes and says:

1. That he is the petitioner in this proceeding and has actual knowledge of all the facts hereinafter stated.

2. That this is an application to compel the Administratix herein to account after a period of more than seven months from the date of issuance of Letters to her by this Court on December 26, 1973.

3. That this affidavit is in opposition to a motion to dismiss the petition herein without specifying any ground thereof, but presumably from indication thereof on the ground that neither the petitioner nor his sister, Maureen Lalli, are distributees of the decedent's estate.

4. At the outset, your deponent respectively shows to the Court that the issue of status should not be summarily determined but should await the outcome of a hearing at

which testimony can be taken. However, presumably the application although not so denominated is being made pursuant to CPLR 3212 and so facts should be shown to create an issue of fact to be considered.

5. Your deponent was married to Janice Elaine Bivins on April 26, 1969, pursuant to a license issued by the Clerk of the City of New Rochelle on April 18, 1969. At the time of said marriage, your deponent was not over the age of twenty-one (21) years having been born on August 24, 1948 and it was necessary for him to secure a consent to his marriage from his parents or guardian and such consent was signed by the decedent, Mario Lalli, and duly acknowledged on March 28, 1969. A photostat of such consent is hereto attached as Exhibit A.

6. The respondent in this proceeding attempts to make a great deal of the fact that the signature of Mario Lalli, the decedent, thereto is followed by the words in parenthesis reading as follows: "Sole guardian, mother deceased" in an attempt to argue thereby that this is not an acknowledgment of parenthood, but that of guardianship only. However, unfortunately for the respondent several lines above is a requirement to state the relationship of the party to be married to the signatory with an indication that such relationship should be specifically designated as follows: "My or our son, daughter or *ward*", (emphasis by deponent) on which line relationship unequivocally is stated to be "my son". Presumably, what was required was the signature of both parents, but as the mother was then dead, the Clerk was satisfied to accept the signature of the father, provided it is indicated that the mother was dead and that he was the sole parent and acknowledged by stating after his name, the words "Sole guardian, mother deceased".

7. Clearly, the words, my son, denote the relationship of fatherhood when the signature is made by a male person and if the relationship be otherwise, then, of course, the words on the said line should have been as emphasized above "ward".

8. The respondent erroneously states in Item 4 that your deponent refers to himself and his sister as illegitimate children of the decedent. No such statements appears in the petition herein. In point of fact, there is no such thing as illegitimate children, the fault is that of the parents and not of the children. All children are natural children of their parents unless they be adopted and your deponent stated in the petition that he and his sister are natural children of the decedent to distinguish them from adopted children and the Court is particularly referred to the fact that the tendency now has been to protect all children.

9. Your deponent recognizes that he may not testify as to any transaction with the decedent any more than the respondent can. But the fact of the matter is that both your deponent and his sister have been supported by the decedent while he lived. However, there is to be submitted together with this affidavit, the affidavit of Rosetta Vollmer Ammirata, who was a confidential secretary to the late Mario Lalli for twelve years prior to the time he was murdered on January 7, 1973. That it is a fact that during his lifetime, particularly 1971 and 1972, my father, Mario Lalli, gave weekly funds to me and my sister, Maureen Lalli, of about $100.00 a week in cash. That on occasions said money was left by the decedent with said Rosetta Vollmer Ammirata for Maureen who was working on a job outside and that sometimes when my father was not going to be in when I returned from my route, the money was left with said

Rosetta Vollmer Ammirata for me with her. This weekly cash had nothing to do with my pay which was paid by check. In fact, until my father died as above stated, both my sister and I through these gifts were partly supported by him.

10. My father, Mario Lalli, was a Catholic and belonged to St. Mary's Church at 23 South High Street, Mount Vernon, New York and both my sister and myself were baptized in that Church, I on August 22, 1953 and my sister on March 19, 1950, as more fully appears from the certificates of Baptism, photostat copies of which are attached as Exhibits B and C.

11. At the time of the original proceeding in this case on the application of your deponent for Letters of Administration pursuant to a request from officials of this Court, there were filed and served upon the attorneys for the respondent, original affidavits with regard to the investigation made by the attorneys for the petitioner herein and your deponent desires to refer to said affidavits and to file in connection with such application for Administration as to the affidavits to be included as part of the affidavits on this application. Said affidavits, to be specific, are the affidavits of Nicholas Columbo sworn to May 7, 1973, Edgar Boone, sworn to April 12, 1973, Hermine Boone, sworn to April 12, 1973, Charlotte Levine, sworn to March 29, 1973, Rosetta Vollmer Ammirata, sworn to March 29, 1973 and Milton Levine, sworn to March 29, 1973, all showing acknowledgment by the decedent of your deponent and his sister as his natural children.

12. That the respondent in her application seems to imply that under the provisions of Estates, Powers and

Trusts Law, Sec. 4-1.2 that the children in the position of the petitioner herein and his sister are not entitled to participate in the estate of the decedent. It is respectfully submitted that said section is unconstitutional under the provisions of the Constitution of the United States of America, and more specifically Amendment XIV thereof and is also unconstitutional under the provisions of the Constitution of the State of New York by reason of discrimination and denial of equal protection, particularly in cases such as this were partially supported by the decedent at the time of his death. Your deponent is well aware of the rule that law should not be cited in any of the affidavits and it is intended by your deponent's attorneys to submit a memorandum on the questions of law involved including the question of unconstitutionality of said sections.

13. In view of the acknowledgment of your petitioner and his sister by the decedent, partial support of them by the decedent, it is respectfully submitted that the questions of fact are raised in this proceeding and that a hearing should be required to determine such issues.

14. However, if the respondent be of the opinion that there are no questions of fact involved and convinces the Court accordingly, there is no objection to the Court determining the question of law involved based upon acceptance of this affidavit, the attached affidavit of Rosetta Vollmer Ammirata and the above affidavits referred to.

WHEREFORE, your petitioner respectfully prays that this motion be denied.

ROBERT M. LALLI

(Jurat omitted in Printing)

Exhibit A to Affidavit of Robert M. Lalli

26, 1969

St. [illegible]us X, Scarsdale

PROOF OF APPLICANTS AGE

If an applicant for license to marry is under twenty-one years of age, documentary proof of age in one of the following forms must be submitted. Indicate by (✓) which of the forms listed below was presented. After inspection and approval of the paper submitted it may be returned to the applicant.

Groom Bride

- [ ] [ ] Original or certified copy of a birth record
- [ ] [ ] Certification of birth
- [ ] [ ] Baptismal record

Groom Bride

- [ ] [ ] Employment certificate
- [ ] [ ] School record
- [ ] [ ] Immigration record

CERTIFICATE OF CONSENT

St. No. 44369 5704

THIS IS TO CERTIFY that I, who have hereto subscribed
(I/we)
my/our name(s), do hereby consent that
ROBERT T. LALLI
(Name of Minor)
who is my son and who is under the age of
(My or our son, daughter, or ward)
21 years, shall be united in marriage to
JANICE BIVAS
by any minister of the gospel or other person authorized by law to solemnize marriages.

WITNESS my hand this 26th day of MAR A.D. 19 69
Mary Lalli
(Mother)

State of [illegible]) SS
County of [illegible])

On the 27th day of March 19 69, before me personally came Mary Lalli

to me known, and known to me to be the individuals described in and who executed the foregoing consent, and they acknowledged to me that they had executed the same.

Notary Public

Exhibit B to Affidavit of Robert M. Lalli

Certificate of Baptism

CHURCH OF

Saint Mary's

23 South High Street

✻ This is to Certify ✻

That Robert Michael Lalli

Child of Marie Lalli

and Elvin Farrell

born in Mount Vernon

on the 24 day of August 1943

✻ Was Baptized ✻

on the 27 day of August 1943

According to the Rite of the Roman Catholic Church

by the Rev. William A Kenny

the Sponsors being Raymond Farrell

and Venitia Taylor as appears

from the Baptismal Register of this Church.

Dated Feb 10, 1973

Joseph A. Devin Pastor.

Exhibit C to Affidavit of Robert M. Lalli

Certificate of Baptism

CHURCH OF

Saint Mary's

23 South High Street

* This is to Certify *

That Maureen Barbara Lalli

Child of Mario Lalli

and Eileen Reina Farrel

born in Mount Vernon

on the 19 day of March 1950

* Was Baptized *

on the 24 day of May 1950

According to the Rite of the Roman Catholic Church

by the Rev. B Mc Shearer

the Sponsors being Pasquale Lombardi

and Evelyn Lombardi as appears

from the Baptismal Register of this Church.

Dated Feb. 10 1973

Joseph Devine Pastor.

Affidavit of Rosetta Vollmer Ammirata

SURROGATE'S COURT

COUNTY OF WESTCHESTER

File No. 1760—1973

In the Matter of the Petition of

ROBERT M. LALLI, to compel ROSAMOND LALLI as the Administratrix of the Estate of MARIO LALLI, deceased, to render and settle her accounts for such Administratrix.

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

ROSETTA VOLLMER AMMIRATA, being duly sworn deposes and says:

That she was employed as a confidential secretary to the late Mario Lalli, the decedent herein prior to the time when he was murdered on January 7, 1973. That during his lifetime, particularly, 1971 and 1972, Mario Lalli gave weekly gifts to each of his children, Robert Lalli and Maureen Lalli, of about $100.00 a week in cash. That said monies were often left by Mario Lalli with your deponent for Maureen Lalli who was working on a job on the outside and that sometimes when Mario Lalli was not expected to be in when Robert Lalli returned to the office Mario Lalli left the monies with her for said Robert Lalli.

ROSETTA VOLLMER AMMIRATA

(Jurat omitted in Printing)

Affidavit of Nicholas Columbo

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

NICHOLAS COLUMBO, being duly sworn, deposes and says:

That he resides at 36 Birch Street, New Rochelle, New York, and has actual knowledge of all of the facts hereinafter stated.

That about 18 years ago he was the contractor working at excavating sites for houses on Darling Avenue and Rogers Avenue in New Rochelle, New York. At that time he met two persons who were living at 135 Daisy Farms Drive, New Rochelle, New York. That the man's name was Mario Lalli and the woman's name was Eileen and she was known to him as Mrs. Lalli. That they had three children; a boy named Robert Lalli, a girl named Maureen Lalli an older boy who was known to him as William Lalli.

That he became friendly with both Mario Lalli and Eileen Lalli and he visited with them at their home on many occasions throughout the years. That he is married and his wife was also friendly with the Lallis and also, his son who was friendly with Robert.

That on many occasions he heard Mario Lalli call Robert Lalli and Maureen Lalli his son and daughter and Mario Lalli told your deponent that Robert Lalli and Maureen Lalli were his children but also told him that William Lalli was not his son but lived with them as he was the son of Eileen with another man. That on many occasions he heard Eileen refer to all the three children, to wit, William, Robert and Maureen as being her children to whom she gave birth. That Eileen told him that the father of William was another man but the father of Robert and Maureen was Mario Lalli.

Affidavit of Rosetta Vollmer Ammirata

About eight or ten years after he first met Mario and Eileen Lalli, he was visiting at their home on one occasion, alone, when the two of them got confidential with him and told him they were not married and they were living together because of the fact that Mario was married before to a woman known as Rose who lived in Mount Vernon and with whom he had no children, and that as Mario liked the children and liked Eileen and did not want to get a divorce, they started living together, and then Mario told him in the presence of Eileen that Robert and Maureen were the children of Mario and Eileen, that Eileen's name was Eileen Farrell, and that William was the son of Eileen by another man to whom she was not married. That Eileen confirmed everything that Mario said.

That thereafter they continued as friendly as they were before, until the time that Eileen died on October 11, 1968. That he visited with Eileen and Mario on many occasions and that about a month before Eileen died, she repeated to him that she was not married to anyone, that with Mario Lalli she had two children, Robert and Maureen, and that with another man she had the other boy, William.

That after Eileen died, he continued to be friendly with Mario until he died on January 7, 1973.

That his information comes from the conversations that he had with both Mario and Eileen.

NICHOLAS COLUMBO

(Jurat omitted in Printing)

Affidavit of Edgar Boone

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

EDGAR BOONE, being duly sworn, deposes and says:

That I reside at 66 Foster Avenue, Mount Vernon, New York.

I have known the Lalli Family all of my life because Mario Lalli's sister went to school with him. I knew Mario Lalli for 27 years and did business with him for 27 years. I have known Bob Lalli since he was 15 years old. Mario Lalli introduced Bob Lalli to me as his son. When Bob Lalli was 16 years old he worked for me one Summer at my business, which is Boone Press, located at 30 Beach Street, Mount Vernon, New York. During that same Summer, Mario Lalli introduced Eileen Farrell to me as Bob's mother. Eileen Farrell came by my place of business on several occasions to pick up her son, Bob, and during one of those times she was introduced to me as Bob's mother. From that time on, Bob Lalli worked for his father, Mario Lalli, and I saw him at least once a week for the next 7 years, when they came to my place of business to do printing work for them.

About 2 years ago, Mario Lalli told me that the man known as William Lalli was actually not his son but was the son of Eileen Farrell. Mario Lalli told me that he raised Bill Lalli as his own son.

During the Summer that Bob Lalli worked for me and when his mother came to my place of business to pick up Bob after work, I was introduced to Maureen Lalli who was identified as the daughter of Mario Lalli and Eileen Farrell.

I would like to add one correction to my earlier statements and that is that I knew Eileen Farrell as Eileen Lalli, the wife of Mario Lalli. I did not know that her last name was anything else but Lalli until approximately 5 years ago.

EDGAR BOONE

(Jurat omitted in Printing)

Affidavit of Hermine Boone

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

HERMINE BOONE, being duly sworn, deposes and says:

That I reside at 56 Foster Avenue, Mount Vernon, New York.

That I am the wife of Mr. Edgar Boone.

I had known Mario Lalli approximately 18 years prior to his death. During that 18 year period, while I was working in my husband's business, I met, spoke to and did business with Mario Lalli on many occasions.

When Bob Lalli was 16 years old, he came to work for my husband at the printing business and Mario Lalli introduced Bob to me as his son.

For the past 8 years I have known Bob by no other name than Bob or Robert Lalli. In fact, in early 1969, my husband and I attended an engagement party in honor of the engagement of Robert Lalli and his fiancee, Janis Bivins. My husband and I sat at the same table as Mario Lalli, Robert Lalli and his fiancee, and Mario Lalli indicated much pride and happiness about his son, Bob, and his marriage to be.

HERMINE BOONE

(Jurat omitted in printing)

Affidavit of Charlotte Levine

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

CHARLOTTE LEVINE, being duly sworn, deposes and says:

That I reside at 30 Hamilton Avenue, Mount Vernon, New York.

That I am now one of the owners of Intown Newspaper & Magazine Inc. Shop located at 6 West First Street, Mount

Affidavit of Charlotte Levine

Vernon, New York, and North End Distributors Inc. located at 5 South Fifth Avenue, Mount Vernon, New York.

That I am the wife of Milton Levine for 36 years.

I met Mario Lalli for the first time when he was working for Mike Spear. The next recollection I have is when he came to the house to speak to Milton, because he was going to take over the Armstrong runs and that was about 32 years ago. Then he went into the service and he had asked Milton to take care of things for him while he was away. Mario came out of the service and Milton, my husband, shared an office on North Second Avenue, Mount Vernon, New York, and Renee would be there doing clerical work and she also delivered scratch sheets.

My husband and I had received an invitation to Mario's wedding before he went into the service. We did not attend his wedding and I met his wife, Rose, for the first time after he came out of the service.

I would see Renee at the office and one day I remember hearing that Renee was going to have a baby. I knew Renee was not married at the time and I asked my husband about it and he told me that it was Mario's baby. I knew at the time that Renee was living at Mount Vernon Avenue and after that Mario set her up in an apartment on Bronx River Road. I saw Renee several times after that and I heard that she had another child that was Mario's. At one time all of this came out into the open. The way it happened was:

There was a story in the newspaper that Mario Lalli was in Coney Island with his children and while on a ride on the Ferris Wheel a large sum of money, which I recall as $5,000, fell out of his pocket. At that point, everyone knew that Mario was leading a double life with two women, because we all knew that he did not have children with Rose. Thereafter, Mario discussed openly of who his children were.

Affidavit of Charlotte Levine

On numerous occasions he told me that Renee had a child before he met her, that that child was William Lalli, that he has two children of his own, that they are Robert Lalli and Maureen Lalli. I also recall having taken my own children to the Circus and Rodeo and meeting Mario Lalli there with his two children and lots of their friends. From that time, of course, he always spoke openly of his children and Rose learned to live with the situation.

I have received a copy of this statement.

CHARLOTTE LEVINE

(Jurat omitted in Printing)

Affidavit of Rosetta Vollmer

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

I, ROSETTA VOLLMER, being duly sworn, depose and say:

That I reside at 497 Bronx River Road, Yonkers, New York.

That I am 32 years of age and have been employed as a secretary for Mario Lalli since on or about January of 1961. That I acted in the capacity of his confidential secretary from January, 1961, until his death in January, 1973.

That during the period of my employment he discussed with me problems and things involving his family. He told me on numerous occasion that although three children carried his name, that they were William Lalli, Bobby Lalli and Maureen Lalli, that although all three were born to Renee (the name he called the woman, now deceased, known as Eileen Renee Farrell), he was the father of two and that those two children were Bobby and Maureen, that at the time he met Renee she already had a child living with her

which had been born to her although she had never been married, that that child's name was Willam, that Wlliam carried the name "Lalli" because he felt it best that all of the children living in the same household should have the same last name.

When I was first working there, I met a woman who was introduced to me as Mario Lalli's wife. She was introduced to me as Rose. I knew that the person who used the name William Lalli was known as Mario Lalli's son. That on one occasion I asked the woman, Rose, how her son was. Whereupon, Victor Lalli, who was in the office, gave me a look as though to say "shut up", so I did just that and subsequently Victor Lalli came over to me and told me that none of the children were Rose's and that William Lalli was not Mario's son but a boy that the woman he was living with had before he met her. Victor Lalli also told me in subsequent conversations that Mario had only two children that were his and that they were Bobby and Maureen.

At the present time I am employed as a secretary for Robert Lalli.

I have received a copy of the foregoing statements.

ROSETTA VOLLMER

(Jurat omitted in Printing)

Affidavit of Milton Levine

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

MILTON LEVINE, being duly sworn, deposes and says:

That I reside at 30 Hamilton Avenue, Mount Vernon, New York.

That I was the owner of Intown Newspaper & Magazine Inc. Shop located at 6 West First Street, Mount Vernon, New York, and North End Distributors Inc., which is now

located at 5 South Fifth Avenue, Mount Vernon, New York, and was previously located on North Fifth Avenue, Mount Vernon, New York. That those two establishments are presently owned by Charlotte Levine, my wife, and my son, Peter Levine.

That I had known Mario Lalli since he was about 9 years of age. At about that time his family was in financial straits. Being that my brother, Benjamin Marcus, and myself were then employed by the Ginsberg News Company, which is now known as the Gaynor News Company, to help him financially we had him working with us or for us as a tail boy on the newspaper trucks. When Mario was over 18 years of age he went to work for Mike Spear, he went to work delivering newspapers. Upon Mike Spear going out of business, Mario Lalli took over the distribution of the National and Armstrong Program. I then went to work for him in my spare time. He also had the distribution of a "green card". Upon his entering the service, he asked me to distribute the "green card" for him so he would not lose the distributorship. His Armstrong and National Sheet were distributed for him by one of our co-workers, Lloyd Turner due to shortage of manpower. Lloyd Turner asked me if I could get someone to cover the New Rochelle Route. At this time I also worked for the Gaynor News Company as a routeman in Port Chester.

In Port Chester I met a young lady by the name of Eileen Renee Farrell. She told me she was being laid-off from her place of employment and I asked her if she would like to drive a car and deliver some sheets from store to store. At that time she had a son of approximately 2 years old and she needed employment to support herself and her son. In order to cut her travelling, she moved to Mount Vernon where she took over the delivery of the New Rochelle Route.

Upon Mario Lalli's return from service, in order to familiarize himself on the routes, he rode with the different routemen. I introduced him to Eileen Renee Farrell and to the best of my knowledge they became friendly. She lived at 107 Mount Vernon Avenue at this time, almost diagonally across from where Mario Lalli had his office. Being on friendly terms with both Mario and Renee, they would confide in me from time to time.

At one time, driving down Mount Vernon Avenue, on my way to Yonkers, Eileen Renee Farrell, whom we all called Renee, stopped me and told me that she was having a baby by Mario Lalli. On my return from the route, checking into Mario Lalli, on South Terrace Avenue, Mount Vernon, New York, I called him to one side and I told him what Renee had said to me. He said "This is true". Before the child was born, he told me that if it was a boy they wanted to name him Robert Michael Lalli. Being born a boy, he naturally assumed that name.

About a year or a year and a half after Mario Lalli's son was born, he told me that he was taking an apartment for Renee on Bronx River Road. When they moved to Bronx River Road, Renee took the apartment under the name of Lalli and he was known by the neighbors as Renee's legal husband.

Sometime after they moved to Bronx River Road, he told me that he and Renee were expecting another child, that he was now contemplating buying a house for Renee, his son Bobby, Renee's son Billy, and the other child that they were expecting. He then bought a house in New Rochelle which he told me about. In fact, he asked me to come up and look at the house before he bought it. The house was bought under the name of Eileen Renee Farrell. He told me he bought this house because he wanted his two

children to have grounds to play in and a good school to go to.

Many is the time that Mario brought Bobby and Maureen, after she was roughtly two or three years old, in the station-wagon for me to see. He introduced them to me and always called them his son and daughter and I have always known them as his son and daughter.

After turning over my businesses to my wife and son, I still help them in the store. Most every morning at approximately 5:30 A.M. up to approximately three or four days before his death, Mario would stop in the store to speak to me, due to the fact that we were old friends. About six months before his death, he told me he was thinking of retiring and turning the business over to his son, Robert Lalli, and the son of Renee Lalli, Billy, his businesses known under different names of Vernon Book Sales Corp. and Oak Sales Inc. He told me that he would draw approximately $200 a week for himself and they would have to give his daughter, Maureen approximately $100 a week for herself and they were to keep the balance.

Upon learning of his death, I contacted Bobby Lalli and told him what his father had said to me, so I took it for granted that I would now be doing business with Robert Lalli and William Lalli.

I have received a copy of the foregoing statement.

MILTON LEVINE

(Jurat omitted in printing)

Reply Affidavit of Rosamond Lalli

SURROGATE'S COURT

COUNTY OF WESTCHESTER

———o———

In the Matter of the Petition of

ROBERT M. LALLI, to compel ROSAMOND LALLI as the Administratrix of the Estate of MARIO LALLI, deceased, to render and settle her accounts as such Administratrix.

———o———

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

ROSAMOND LALLI, being duly sworn, deposes and says:

She submits this affidavit in reply to the answering affidavit of the petitioner opposing the motion to dismiss his petition for an unvoluntary accounting.

She, as the widow of the decedent, vehemently denies that the alleged illegitimates are the children of her late husband. Mario Lalli operated several business and he employed persons to assist him in operating these businesses. He used the services of an accountant and those of a lawyer. He was the type of a man who was strong of will and determination. It may well be that these factors led to his murder by the confessed killer, William Lalli, the brother of petitioner, who also uses decedent's name, though admittedly decedent was not his father.

If either Robert or Maureen Lalli were his children, he would surely given them his protection through a filiation order and he would have unqualifiably declared himself to

be their father in court through a declaratory judgment. He was not the kind of man that would sign a paper consenting to Robert's marriage as his guardian, if in fact, he was Robert's father. For the first time following decedent's death, both of the alleged illegitimates raise the issue of paternity. The alleged consent which petitioner strongly urges the court to accept as an acknowledgment of his status lacks substance.

Two certifications of Baptism are annexed to the opposing papers. Disregarding the passage of time between birth and baptism particularly with respect to Robert Lalli, it is respectfully contended that these certificates cannot be adduced for the purpose of proving the identity of petitioner's antecedents. That in the baptism ceremony only the presence of a child, his sponsors and the priest are required. The consent of one parent to the baptism, prior to the 1966 revision, was not even necessary and even a child of non Catholic, in a case of an emergency, could be baptized in a Roman Catholic Church, without the permission and consent of either of his parents. New Canon Law 750, See Summary of Canon Law, Rev. Emile Jombart, page 91. Baptism is a consecration of a child in the Catholic faith. It cannot attest to the paternity of a child, where neither the permission, consent or presence of his parents are required.

These illegitimates should have produced their birth certificates issued by the State of New York at the time of their birth, which would contain the naming of their father by their deceased mother. This record of birth, which is required to be made in accordance with the laws of the State of New York, would speak more loudly and convincingly as to the petitioners' pedigree, than the statements of persons who may or may not be witnesses to off hand remarks made by the decedent, obviously made not to be taken ser-

iously. Petitioners failure and refusal to supply their New York birth certificates, attests that decedent was not their father.

The affidavit of Rosetta Vollmar Ammirata, fails to state her relationship to the petitioner. She acknowledged her employment with him during December 1973, as his secretary and it is believed she is still employed by him. It is believed that Mrs. Ammirata will admit upon questioning that the decedent was a serious and strong willed man who would have legally acknowledged petitioner and his sister, if they were in fact his children.

It is respectfully contended that if EPTL 4-1.2 is constitutional as it applies to the fact pattern here and as it has been held constitutional on the exact fact pattern as it appears in Matter of Hendrix 68 Misc 2d 439 and in Matter of Belton, 7 Misc 814, that a trial of the petitioner's and his sister's pedigree is unnecessary and wasteful of the Court's time and respondent's funds. A finding of this section's validity will obviate the need for the accounting as the deponent is the sole heir of this estate.

WHEREFORE, respondent prays that her motion for the dismissal of the petition be granted.

ROSAMOND LALLI

(Jurat omitted in Printing)

Decree of Surrogate Evans V. Brewster

At the Surrogate's Court, held in and for the County of Westchester, at the County Courthouse, White Plains, New York, on the 26th day of November, 1974.

Present:

HON. EVANS V. BREWSTER,

Surrogate

INDEX #1760/73

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of MARIO LALLI, deceased, to render and settle her accounts as such Administratrix.

ROBERT M. LALLI, residing at 135 Daisy Farm Drive, in the City of New Rochelle, County of Westchester, State of New York, having petitioned the Surrogate's Court of the County of Westchester to compel Rosamond Lalli, Administratrix of the goods, chattels and credits of Mario Lalli, deceased, who at the time of his death resided at 415 Cramatan Avenue, in the City of Mount Vernon, County of Westchester, to render and settle her account as such Administratrix, by a petiton duly verified August 23, 1974, and a citation having duly issued thereon returnable on the 20th day of September 1974, and said Rosamond Lalli having answered said petition by an answer duly verified September 16th, 1974, and having thereafter moved by a notice of motion dated October 1, 1974, supported by the affidavit of

Decree of Surrogate Evans V. Brewster

Rosamond Lalli sworn to October 1, 1974, to dismiss the petition of said Robert Lalli on the ground that neither Robert Lalli nor his sister, Maureen Lalli, are distributees of decedent's estate under provisions of EPTL 4-1.2 and the petitioner having submitted an affidavit sworn to October 10, 1974, together with exhibits thereto attached, and affidavit of Rosetta Vollmer Ammirata sworn to October 10, 1974, in opposition thereto, and said Rosamond Lalli having submitted a reply affidavit sworn to October 23, 1974, and said application having come up to be heard on the 25th day of October, 1974, and after hearing Muriel Lawrence, Esq., attorney for the respondent, in support of the application, and Henkin, Henkin and Quinn, Esqs. (Leonard M. Henkin, Esq. of counsel), attorneys for the petitioner, in opposition thereto, and upon reading all of the aforesaid and due deliberation having been had, and the Surrogate having rendered a decision dated November 15, 1974, sustaining the constitutionality of EPTL 4-1.2 in its application to the petitioner and his sister herein, as against their clam that said section is unconstitutional, in application to them

Now, it is

ORDERED, ADJUDGED AND DECREED, that EPTL 4-1.2 is constitutional as applicable to the petitioner herein, and that by reason thereof petitioner is not a distributee of the decedent herein and that he lacks status to petition for compulsory accounting by the Administratrix, and it is further

ORDERED, ADJUDGED AND DECREED, that the petition herein he and the same is hereby dismissed.

EVANS V. BREWSTER
Surrogate

List of Opinions and Orders

The opinion of Surrogate's Court, Westchester County is printed as Appendix B in Jurisdictional Statement NO. 77-1115.

The original order of affirmance of New York Court of Appeals is printed as Appendix C in the Jurisdictional Statement NO. 75-1148.

The original opinion on appeal to the Court of Appeals is printed as Appendix A in the Jurisdictional Statement NO. 75-1148; 38 N.Y. 2d 77.

The order of affirmance of New York Court of Appeals on reconsideration is printed as Appendix C in the Jurisdictional Statement NO. 77-1115.

Notice of Appeal is printed in Appendix E to Jurisdictional Statement NO. 77-1115.

The majority and dissenting opinions on reconsideration are printed as Appendix A in the Jurisdictional Statement NO. 77-1115; 43 N.Y. 2d 65.

IN THE

Supreme Court of the United States

October Term, 1977

No. **77-1115**

IN THE MATTER

OF

The Petition of ROBERT M. LALLI,
Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,
Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS.

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AVSTREIH, MARTINO & WEISS
Of Counsel

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CITATIONS.

CASES:

IN THE

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16, paragraph (1) (b), of the Rules of the Supreme Court of the United States, appellee moves this Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

Jurisdiction.

Appellant appeals from a final judgment rendered by the Court of Appeals of the State of New York, entered

on November 17, 1977, affirming the decree of the Surrogate's Court of Westchester County, dismissing the petition for a compulsory accounting and adjudging that Estates, Powers & Trusts Law, Section 4-1.2 is constitutional.

Question Presented.

The limited question presented to this Court is whether the adherence by the Court of Appeals of the State of New York to its previous decision is consistent with the decision of this Court in deciding *Trimble v. Gordon,* 430 U. S. (1977).

Statute Involved.

Estates, Powers and Trusts Law §4.1-2, 17B, McKinney's Consolidated Laws of New York, 531-532, provides as follows:

§4-1.2 *Inheritance by or from illegitimate persons*

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from

the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Statement.

Decedent died intestate on January 7th, 1973. The natural mother of the appellant predeceased the decedent, having died on October 11th, 1968. The appellant alleges that he is the child of the decedent, was born out of wedlock in 1948, and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on his behalf.

On August 26th, 1974, the appellant filed a petition seeking a compulsory accounting. On October 1st, 1974, appellee served a notice of motion to dismiss on the ground that the appellant was not a distributee. Appellee's motion to dismiss was granted by the Surrogate by the opinion of the Surrogate dated November 15th, 1974 (Appendix A) and the Court of Appeals unanimously affirmed by its opinion dated November 25th, 1974 (Appendix B). On remand by this Court, the Court of Appeals of the State of New York adhered to its previous decision by an opinion rendered November 17th, 1977 (Appendix C).

It must be reiterated that at no time during the decedent's lifetime did the appellant seek any judicial determination that he was in fact the son of the decedent as is required by EPTL 4-1.2.

Argument.

We believe that there is no substantial doubt as to the constitutional validity of Estates, Powers & Trusts Law, Section 4-1.2, and that the constitutional issues in this case do not require plenary consideration by this Court. We believe that the judgment rests on an adequate non-federal basis and does not present a substantial federal question. Hence we submit that this Court should dismiss the present appeal.

The Illinois statutory scheme with regard to inheritance by or from illegitimate persons and the determination by the Supreme Court of the United States with regard to that statute in *Trimble v. Gordon*, 430 U. S. (1977).

Section 12 of the Illinois Probate Act provides in relevant part:

> "An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate."

The Illinois statute allowed an illegitimate child to inherit from its mother only as distinguished from its father except that an illegitimate child whose parents

intermarried and who is acknowledged by the father as the father's child shall be considered legitimate and can inherit on that basis. No provision was made in the Illinois law for a judicial determination of paternity for the purposes of inheritance and no illegitimate child in Illinois or no representative of such illegitimate child can bring a judicial proceeding to have the child declared a child of the alleged illegitimate father. A clear distinction was made in Illinois between a claim of a child with regard to inheritance against its natural mother as opposed to a claim of an illegitimate child against its alleged father for inheritance purposes. The Illinois statute when contrasted with the New York statutory scheme bears no relationship in that the New York statutory scheme permits an illegitimate child to inherit both from its natural mother and natural father and provides for a judicial proceeding for the purposes of determining parentage as to the alleged putative father for the obvious reason that from a physiological point of view it is far easier to determine the natural mother than the natural father.

The United States Supreme Court when considering the Illinois statute in *Trimble v. Gordon, supra,* by a divided court distinguished *Labine v. Vincent,* 401 U. S. 572 (1971), and held that the analysis by the Illinois Supreme Court of the Illinois statute (§12 of the Illinois Probate Act) vis-à-vis the Fourteenth Amendment of the United States Constitution (Equal Protection Clause) was perfunctory and incomplete.

In *Labine v. Vincent,* 1971, 91 S. Ct. 1017, 401 U. S. 532, 28 L. Ed. 2d 288, this Court upheld the constitutionality of a Louisiana statute which contained succession provisions relating to the right of illegitimate children to share in intestate distributions. In specifically denying illegitimates the right to take under state laws

of succession, the Court distinguished a claim to share in an estate by reason of intestacy from claims to share in the proceeds from wrongful death actions as in *Levy v. Louisiana*, 391 U. S. 68, and *Glana v. American Guar. Co.*, 391 U. S. 73.

> "The Legislature was attempting to provide fair and reasonable standards for proving rights to participate in an estate. There are obvious reasons for different provisions in respect of the mother's estate and that of the putative father. The Legislature found good reason for requiring a court determination of paternity and for prescribing a limitation of time."

Surely the New York statute is as fair and reasonable as Louisiana's.

It is respectfully submitted that the New York statute in question and the courts of this state have given adequate consideration to the statute's proper objective of assuring accuracy and efficiency in the disposition of property at death, something which apparently was not done by either the Legislature or courts of the State of Illinois and that the New York statute is, as required by the Supreme Court of the United States, "carefully tuned to alternative considerations."

In this regard it is important to note that had the appellant in the *Trimble* case, *supra*, been a resident of the State of New York and had she made her claim under the New York statute now before this Court, she could have been successful in establishing her right to inherit. The illegitimate had, in Illinois, obtained an order of the Illinois court during the putative father's lifetime determining paternity and determining which putative father was indeed the father of the illegitimate.

Such an order under EPTL 4-1.2 would have allowed the illegitimate to inherit from her father since no distinction is made in New York between the right of an illegitimate to inherit from either its mother or father once the paternity of the father is established in a judicial proceeding.

It is respectfully urged that the Supreme Court determination in *Trimble v. Gordon, supra,* is limited on its facts to the peculiar statute in Illinois declared unconstitutional. Since the Illinois statute bears no relationship to the New York statute which clearly provides a constitutional framework with regard to inheritance by illegitimates, the determination by the Supreme Court in the *Trimble* case, *supra,* should not affect the holding in this case.

CONCLUSION.

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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AVSTREIH, MARTINO & WEISS,
Of Counsel.

APPENDIX A.

Opinion of Surrogate's Court Westchester County

SURROGATE'S COURT

WESTCHESTER COUNTY

In the Matter of the Petition of

ROBERT M. LALLI to compel ROSAMOND LALLI as the Administratrix of the Estate of

MARIO LALLI,

Deceased,

to render and settle her accounts as such Administratrix.

HENKIN, HENKIN & QUINN,
Attorneys for Petitioner

MURIEL LAWRENCE,
Attorney for Respondent

BARWSTER—S.

This is a motion to dismiss a petition for a compulsory accounting on the ground that the petitioner, an illegitimate person, has no status as a distributee to compel an accounting. Petitioner attacks the constitutionality of the statute on descent and distribution of a decedent's intestate property as it applies to illegitimate issue on the grounds that it is a denial of equal protection under the Constitution of the United States (Fourteenth Amendment) and the Constitution of the State of New York (Article I, §11).

Decedent died on January 7, 1973. The mother of petitioner predeceased the decedent. The constitutional issue was initially raised on the application by an alleged son for letters of administration. However, no determination was made at that time since the widow who had a prior right to letters, duly qualified and was appointed administratrix on December 26, 1973.

The petitioner in this compulsory accounting proceeding states that he and his sister are children of decedent; were born out of wedlock; and that filiation proceedings were neither instituted nor any order of filiation declaring paternity ever made at any time on behalf of either of them. They do state, however, that they were supported, in part, by the decedent during his lifetime. Petitioner and his sister claim to be lawful distributees of the decedent together with decedent's widow. They further claim that EPTL §4-1.2(2) which would deny them a share in the estate of decedent as distributees by reason of their illegitimacy without an order of filiation having been made during the life of the father declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child, is unconstitutional and therefore void. The motion by the administratrix to dismiss the petition relies on the constitutionality of the aforesaid statute, asserting that even if the proof is offered which establishes that decedent was the father of petitioner and his sister or contributed to their support, nevertheless they are not distributees by virtue of the statute and petitioner has no status to compel an accounting by the administratrix.

This is not a novel issue. The exclusion of illegitimates, as distributees under various state statutes has already

been considered by the courts. In recent years the United States Supreme Court has on three separate occasions considered the constitutionality of the complex set of rules regarding the rights of illegitimate children in the statutes of the State of Louisiana. In the case of Levy v. Louisiana, 391 U. S. 68, the denial of the right of an illegitimate child to recover damages for the wrongful death of his mother was declared unconstitutional. In a second case, Glona v. American Guarantee, 391 U. S. 73, the Louisiana statute that denied the right of a mother to recover damages for the wrongful death of her illegitimate child was also declared unconstitutional. Next was decided the case of Labine v. Vincent, 401 U. S. 532, in which the right of the State of Louisiana to make laws for distribution of property, even to the exclusion of illegitimates, was upheld as constitutional. After considering the restrictive provisions under Louisiana law with respect to illegitimates, the Court held:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collat-

eral relations, as opposed to ascendants, and against ascendants, as opposed to descendants.

• • • • •

"It may be possible that some of these choices [of distribution of an intestate's property] are more 'rational' than the choices inherent in Louisiana's categories of illegitimates. But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. • • • We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power to make laws for distribution of property left within the State." Labine v. Vincent, supra, pp. 537-539.

The New York law on inheritance by or from illegitimate persons is set forth in EPTL §4-1.2 which provides in part as follows:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiati

declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) • • • • •"

This statute has been somewhat eroded by constitutional attacks made upon some of its provisions as applicable to certain types of cases. In so far as the statute would limit and restrict the rights of illegitimate children who have suffered pecuniary injuries to share in the distribution of damages recovered in an action for the wrongful death of their putative father, it has been declared unconstitutional (Matter of Ortiz, 60 Misc 2d 756). But even in the Ortiz case it was pointed out that the Legislature may in its absolute discretion designate one class of beneficiaries to inherit and another class to receive the damages for wrongful death. Referring to the equal protection clauses of the U. S. Constitution (Fourteenth Amendment) and the Constitution of the State of New York (Article I §11) the court said:

"These provisions do not forbid unequal laws and do not require every law to be equally applicable to all persons (Barbier v. Connolly, 113 U. S. 27). Equal protection only requires that a statute operate equally upon all members of the group provided the group is defined reasonably—reasonably being measured in terms of a proper legislative purpose." p 759.

Perceiving a rational legislative purpose in discriminating between a child-father relationship which is not present in the child-mother relationship, the court further stated:

"But some difference does exist in such relationships at least with respect to the greater difficulty in ascertaining paternity. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy. To the mother however, the birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is a child of a particular woman is rarely difficult to prove. Proof of paternity on the other hand as experience has shown is a much more difficult problem.

• • • • •

"It is not difficult to perceive a rational purpose in excluding illegitimates in a statute governing intestate *inheritance* from the father. In such a statute the illegitimates' rights often come into direct conflict with those of a spouse and legitimate children. Recognition of the illegitimate automatically diminishes the share of such other next of kin." Matter of Ortiz, supra, p. 761.

The constitutionality of the restrictions limiting illegitimates to inherit from their father in certain cases only was considered in Matter of Crawford, 64 Misc 2d 758. The court stated at page 763:

". . . It is urged that this limitation creates an arbitrary classification as to infants, where there is no filiation order within two years from the date of birth. The test to be applied 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without much basis.' (Truax v. Corrigan, 257 U. S. 312, 337; Matter of Posner v. Rockefeller, 31 A D 2d 352.)

"The limitations upon the right of an illegitimate child to inherit from its father are set forth in absolute fashion in the statute. The two-year limitation provision is not akin to the Statute of Limitations found in section 517 of the Family Court Act but rather it establishes a 'rule of substantive law, a statute prerequisite • • • a condition precedent' to the qualification of the infant as a distributee under EPTL 4-1.2.

"The legislative intent is clear on this point: 'Since inheritance from the father of an illegitimate has always been intertwined with proof of paternity, it is recommended that only a limited right of inheritance from the father be permitted. The child is only permitted to inherit from the father where a court of competent jurisdiction (which under present law in most cases will be the Family Court) has made an order declaring paternity during the lifetime of the father in a proceeding commenced within two years after the birth of the child.' (Fourth Report of Temporary State Comm. on Law of Estates, 1965, p. 37; N. Y. Legis. Doc., 1965, No. 19.)

"Such limitations are not arbitrary or capricious, but were adopted by the Legislature to avoid post-

death litigation. (Matter of Consolazo, 54 Misc 2d 398; Matter of ABC v. XYZ, 50 Misc 2d 792; Matter of Middlebrooks v. Hatcher, 55 Misc 2d 257.)"

Matter of Hendrix, 68 Misc 2d 439 considered anew the constitutionality of EPTL §4-1.2 and after a full discussion of the many cases involving the same concluded "that the New York statute requiring a reasonable substantiation of the claim of paternity does not impose an improper condition and does not result in a discrimination constituting a denial of equal protection of the law to an illegitimate". p. 444. In Matter of Bolton, 70 Misc [2] 814, the court reconsidered the statute anew, reaffirmed its constitutionality and despite the fact that decedent had admitted paternity in an affidavit, it held that only full compliance with the provisions of EPTL §4-1.2 could entitle an illegitimate child to inherit from the putative father. The court stated: "It is for the Legislature and not the court to overcome the restrictive elements of this statute." p. 819.

Cases involving wrongful death cited by the petitioner in which limiting provisions of the statute were voided as unconstitutional are not determinative of the issue here. As pointed out by the court in Labine v. Vincent, supra, p. 536:

> "The cause of action alleged in Levy was in tort. The court held that the state could not totally exclude the illegitimate children who were unquestionably injured by the tort. Levy did not say that a state can never treat an illegitimate child differently from legitimate offspring."

The Supreme Court of New Jersey clearly pointed out the distinguishing elements in the claims of illegitimates to damages for wrongful death of a putative father as opposed to inheritance from a decedent. In Schmoll v. Creecy, 54 N. J. 194, the court stated:

> "... There are of course differences between a wrongful death statute and an inheritance statute. A wrongful death statute itself determines who shall benefit, and the decedent has no voice in the matter. On the other hand, an inheritance statute embodies no more than the presumed intention of decedents who do not express their wish. It may therefore be urged that our inheritance statute does not generate a distinction between legitimate and illegitimate children but merely reflects the probable intent of individuals who are themselves constitutionally free to draw that line and who presumptively subscribe to the view of the statute by omitting to direct otherwise by will. Then, too, at least in the case of a male decedent, there is fear of spurious claimants, a problem more formidable in estate situations than in wrongful death actions in which the amount of the recovery will depend critically upon the amount of pecuniary injury shown."

Finally, the court observes that while the limitation in EPTL §4-1.2 on bringing an action to declare paternity within two years from the birth of the child has been declared unconstitutional as an irrational discrimination between two classes of individuals, namely public welfare officials and others (Wales v. Gallan, 61 Misc. 2d 831), nevertheless the requirement that it be done during the lifetime of the father, giving him a chance to contest the same, is

obviously a rational requirement and constitutionally sound. The attempt to prove paternity at this date comes too late.

Accordingly, the court determines that EPTL §4-1.2 is applicable to the alleged son of decedent, that he is not a distributee of the decedent herein and that he lacks status to petition for a compulsory accounting by the administratrix. The motion to dismiss is granted.

Settle order.

November 15, 1974

EVANS V. BREWSTER
Surrogate

APPENDIX B.

Opinion of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Surr. Ct. No. 440

In the Matter of the Accounting of ROSAMOND LALLI as the Administratrix of the Estate of Mario Lalli, deceased,

ROBERT M. LALLI,
Appellant,

—v.—

ROSAMOND LALLI, as Administratrix &c.,
Respondent.

---

(440)

HENKIN AND HENKIN
Mt. Vernon
(LEONARD M. HENKIN of counsel)
for appellant.

AVSTREIH, MARTINO & WEISS
Mt. Vernon
(LEONARD A. WEISS of counsel)
for respondent.

Jones, J.

We hold that Section 4-1.2(a)(2) of the Estates, Powers and Trusts Law is not unconstitutional to the extent that it prescribes the entry during the father's lifetime of an order of filiation declaring paternity as a condition precedent for inheritance by an illegitimate child from his or her father.

In this case an illegitimate son, over 25 years of age at the time of his father's death, sought an order in Surrogate's Court for a compulsory accounting by the administratrix of his deceased father's estate. The administratrix, the decedent's widow, moved to dismiss the son's application on the ground that he was not a distributee and hence had no standing to compel an accounting.

The facts are undisputed. Appellant and his sister were the natural son and daughter of the decedent, having been born on August 24, 1948 and March 19, 1950, respectively. Respondent administratrix had been married to the decedent for some 34 years prior to the decedent's death on January 7, 1973, during which time the decedent and she had resided together as husband and wife. The natural mother of appellant and his sister had died on October 11, 1968. It was not contested that during his lifetime the decedent had provided financial support for both appellant and

his sister. Additionally it appeared that when appellant wished to be married in April, 1969 parental consent was required because he was then under age 21. Incident to the granting of such consent the decedent had acknowledged that appellant was his son in a writing sworn to before a notary public. It is agreed, however, that there was never any order of filiation.

The Surrogate granted respondent's motion to dismiss the application for a compulsory accounting on the ground that appellant was not a distributee under EPTL 4-1.2(a)(2). In so doing the Surrogate rejected appellant's contention that § 4-1.2(a)(2) is unconstitutional. On direct appeal pursuant to CPLR 5601(b)(2) we affirm.

Section 4-1.2, bearing the heading, "Inheritance by or from illegitimate persons", provides in pertinent part:

> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

• • •

Appellant's assault on § 4-1.2(a)(2) is grounded in contentions that its provisions deny him the equal protection of the law assured him under State and federal constitutions and the due process of law to which he is entitled under the federal constitution. In disposing of his challenge we address three aspects of asserted constitutional infirmity: first, the difference in proof of parenthood necessary to establish the right of inheritance from a natural father as contrasted with the proof required to establish the right of inheritance from a natural mother; second, the insistence that there be an order of filiation; and third, insistence that the order of filiation be made during the lifetime of the natural father.[1]

At the threshold we recognize a material distinction between benefits and rights to which an illegitimate child is entitled in consequence of the fact that he or she is the child of his or her parent on the one hand, and, on the other, expectations only to which such a child may look forward in consequence of a child-parent relationship. The former category includes entitlement to the proceeds of a wrong-

[1] Since this appellant's claim to status as a distributee is foreclosed by the provision of § 4-1.2(a)(2) that the order of filiation must be made during the lifetime of the natural father, a provision the constitutionality of which we here uphold, we do not reach the challenge addressed to the separate provision of the statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (§ 4-1.2[a][2]). We intimate no views with reference to the asserted unconstitutionality of that provision.

ful death action (*Levy* v. *Louisiana*, 391 US 68; cf. *Glona* v. *American Guaranty Co.*, 391 US 73); to workmen's compensation benefits (*Weber* v. *Aetna Cas. & Surety Co.*, 406 US 164); to financial support from a father (*Gomez* v. *Perez*, 409 US 535); to social security benefits (*Jimenez* v. *Weinberger*, 417 US 628). In such cases the applicable standard for review as to constitutionality is that sometimes labeled strict scrutiny (a compelling state interest in the objective sought and the least restrictive means for achieving that objective [cf. *Montgomery* v. *Daniels*, —— NY2d ——, ——]).

As appellant concedes, however, the test in the present instance (involving only an inchoate expectancy at best) is whether there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible state objective. (*Labine* v. *Vincent*, 401 US 532; cf. *Montgomery* v. *Daniels*, *supra*, p. —). We have no difficulty in concluding under this less stringent test that there is a reasonable basis for each of the three distinctions which the Legislature has prescribed and which appellant attacks.

In the first place, given the state of our present knowledge in the field of genetics, it cannot be gainsaid that the identification of a natural mother is both easier and far more conclusive than the identification of a natural father. It may be one day that, notwithstanding the nonparticipating role of the father at birth, scientific tests will nonetheless be available by means of which the fact of fatherhood can be demonstrated as compellingly as is presently true with respect to the fact of motherhood. Clearly such proof is not available today. In this circumstance we conclude that the Legislature acted rationally in prescribing a specially defined procedure for establishing the fact of father-

hood. Once that fact is established in the formal manner required by the statute, the right of an illegitimate child to inherit from his father is the same as his right to inherit from his mother, and exactly the same as if he had been born in wedlock. There is no discrimination against illegitimacy. The difference exists only with respect to the means by which the fact of fatherhood is to be established, and then for sound and understandable reasons.

Secondly, we cannot say in the face of practical problems and difficulties associated with proof of fatherhood that it is irrational to require the formality of a court order adjudicating the fact of paternity. We recognize, of course, that in particular instances, a duly acknowledged written statement of paternity, or conclusive proof of substantial and continuous financial support may be very compelling. But even in such instances, under familiar principles an apparent admission of paternity may be negated by proof of misrepresentation, fraud, duress or other vitiating circumstance. To require the formality and conclusiveness of a judicial determination is not irrational.

Finally, we conclude that it was not irrational, either, to lay it down as a condition precedent that the order of filiation must be made during the lifetime of the natural father. The father may be expected to have greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process. Beyond that, and perhaps even more important, by their very nature the statutes of descent and distribution serve as an expression of the presumed intention of the deceased for the distribution of his property on his death, absent any

effective testamentary or *inter vivos* disposition. No one questions that a natural father may disinherit his son notwithstanding that the fact of fatherhood has been conclusively established in a paternity proceeding; he has only duly to execute a will appropriate for that purpose. Similarly a father may effectively provide for the distribution of all or any part of his property to an illegitimate child notwithstanding that there has been no order of filiation. Since, then, the ultimate question of whether a son shall inherit lies within the volitional determination of the father, it is not unreasonable to require in addition to a highly reliable standard of proof of parenthood, that the alleged father have personal opportunity to participate, if he chooses, in the procedure by which the fact of his fatherhood is established.

Accordingly the decree of Surrogate's Court, Westchester County, should be affirmed.

• • • • •

Decree affirmed, with costs. Opinion by Jones, J. All concur.

Decided November 25, 1975

APPENDIX C.

Opinion of New York Court of Appeals

STATE OF NEW YORK COURT OF APPEALS

SURROGATE COURT

No. 560

In the Matter of

ROBERT M. LALLI,

Appellant,

vs.

ROSAMOND LALLI, as Administratrix &c of
Mario Lalli, Deceased,

Respondent.

(560)

MORRIS R. HENKIN & LEONARD M. HENKIN,
Mt. Vernon,
for appellant,

LEONARD A. WEISS,
Mt. Vernon,
for respondent.

JONES, *J.*

This case is now before us on remand from the Supreme Court of the United States for further consideration in the light of *Trimble* v. *Gordon* (430 U.S. ——). We adhere to our previous decision (38 N.Y.2d 77).

At the outset we observe that the standard to be applied in our review, while "less than strictest scrutiny", is nonetheless "not a toothless one" (perhaps in the sense that it

would be a "toothless" standard if it could be satisfied by a mere finding of some remote rational relationship between the statute and a legitimate state purpose) (430 U.S. ——).

We find the Illinois statute which was before the Court in *Trimble* significantly and determinatively different from the New York statute. Under the former the right of an illegitimate child to inherit from his father depended not only on proof, by way of the father's acknowledgement, of the fact of paternity, but on proof as well that the parents had intermarried (Ill. Rev. Stat. ch 3, § 12 [1961]; cf. Ill. Rev. Stat. ch 3, § 2-2 [1976-1977 Supp.]). By contrast, under our New York statute the right to inherit depends only on proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father (Estates, Powers and Trusts Laws. § 4-1.2, subd [a], par [2]).[1]

In our analysis the Illinois statute focuses on a requirement that the family relationship be "legitimatized" by the subsequent marriage of the parents. Thus, there was a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there were no doubt whatsoever as to paternity.[2] The Supreme Court held unacceptable

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[1] As we noted when this case was initially before us, inasmuch as we uphold that provision of the statute which forecloses this appellant's claim to status as a distributee because no order of filiation was made during the lifetime of his father, we do not reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child" (EPTL 4-1.2, subd [a], par [2]; 38 NY2d 80, fn).

[2] We observe that this appears to have been the case in *Trimble* itself. A paternity order had been entered during the lifetime of the father finding Gordon to be the father of the child, Deta Mona (430 US ——). On the facts there would have been no question but what Deta Mona would have been entitled to inhert from her father under the New York statute.

such a statutory provision which penalized children born of an "illegitimate relationship" between their parents—concluding that the sins of the parents are not to be visited upon their children. There is nothing similar in our statute; it is concerned only with proof of paternity and the establishment of a blood relationship between the father and the child.

In another aspect we note that even with respect to the issue of paternity there is a different emphasis in the two statutes. Illinois requires in a conclusory form only that the child be "acknowledged by the father as the father's child". New York, on the other hand, is evidently concerned not only with the fact of paternity but with the form and manner, and thus the availability, of its proof, i.e., by order of filiation.

The Supreme Court explicitly recognized the inherently more difficult problems of proof of paternity than of maternity and acknowledged that the states have a legitimate interest in making provision for the orderly settlement of estates and the dependability of titles to property passing under intestacy laws (430 U.S.).

> "The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." (430 U.S.).

The issue here appears to turn, then, on whether a state may constitutionally require as proof of paternity a judicial determination made during the lifetime of the father. We find nothing in *Trimble* which forecloses this possibility; specifically we do not, as appellant would have us, read footnote 14 at page as forbidding such a requirement The preference for judicial determinations with respect to title to real property has a long and respected history and provides an available record. In effect our statute requires that the determination of paternity be made in the formality of a judicial proceeding in consequence of which there will follow an order of filiation and a permanent, accessible record. If a father is prepared to execute a formal acknowledgment of paternity (a prerequisite which appears clearly to be acceptable to the Supreme Court), obtaining an order of filiation will not be burdensome. Nor do we perceive the seeds of constitutional infirmity in the requirement that the judicial determination be made within the lifetime of the father. As we noted before, the father "may be expected to have a greater personal knowledge than anyone else, save possibly the mother, of the fact or likelihood that he was indeed the natural father. His availability should be a substantial factor contributing to the reliability of the fact-finding process." (38 NY2d 82.) Indeed a formal acknowledgment of paternity, apparently found in *Trimble* to be an acceptable requirement, obviously entails personal participation by the father during his lifetime.

Finally, we would merely note, if *Trimble* is to be read as inviting exploration of the intent of the Legislature in adopting the particular statute, that research of counsel as well as our own has disclosed no relevant materials with respect to the enactment of § 4-1.2(a)(2). We could speculate as to the details of legislative intentions, and so could

others. To us it is clear, even in the absence of specific legislative materials, that this statute serves a legitimate state purpose—in the language of *Trimble*, to make provision for "the orderly settlement of estates and the dependability of titles to property passing under intestacy laws". We know of nothing, and there is nothing in the record, to suggest that our statute was intended as a moral, ethical or social disparagement of illegitimacy or was the product of proponents whose objective, even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms.

For the reasons stated we conclude that our statute meets the constitutional guidelines articulated in *Trimble*. Accordingly, the decree of Surrogate's Court, Westchester County, should be affirmed, with costs.

Cooke, *J.* (dissenting):

Admittedly, the Illinois statute recently declared unconstitutional by the Supreme Court of the United States is significantly different from the New York statute (EPTL, 4-1.2, subd [a], part [2]). Nevertheless, it is respectfully submitted that our statute is likewise unconstitutional in light of *Trimble* v. *Gordon* (430 U.S. 762).

In *Trimble*, the Supreme Court was careful to delineate the boundaries of its inquiry, thus explaining that

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance (430 U.S. at p. 771).

The Court also recognized that "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally" (Id. at p. 770). Nevertheless, considering the Illinois statute, the court reasoned:

> We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed (Id. at pp. 770-771).

Furthermore, concerning the interests of the states in the accurate and efficient disposition of property, the Court commented:

> Evidence of paternity may take a variety of forms, some creating more significant problems of inaccu-

racy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. at p. 772, n. 14).

Applying the equal protection analysis employed by the Supreme Court in *Trimble* necessitates consideration of the relation of our statute to our State's "proper objective of assuring accuracy and efficiency in the disposition of property at death" (430 U.S. at p. 770). Of course, our statute is not mindless nor totally irrational and a concern for solid proof of paternity is a legitimate state purpose. But if the court is now required to put teeth into its scrutiny, we are obliged to go beyond the purpose of the statute to a consideration of the rationality of the burden it places on the State's illegitimate children.

A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, *ipso facto*, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often result simply from the fact that the putative father is supporting and acknowledging the children as

his own. Or, it might well be and often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.

The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Court Act, § 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in the eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of *Trimble* it must be concluded that the statute leaves the "middle ground" of what a state may legitimately require and settles on the side of complete exclusion.

In *Trimble*, the Supreme Court reasoned that a paternity order obtained for purposes of requiring the father to provide support should be sufficient to establish paternity

for purposes of allowing an illegitimate child to inherit from a father who dies intestate (see 430 U.S. at p. 772).* However, the Court did not suggest that this is the only method for making this determination. Our statute considers no alternatives and imposes a sine qua non requirement that an order of filiation be obtained during the lifetime of the father (EPTL, 4-1.2, subd [a], par [2]). For this reason, in light of *Trimble*, our statute fails to pass constitutional muster.

Accordingly, if paternity is established, the petition for an accounting should be granted.

• • • •

Upon reargument: Prior determination of this court affirming the decree of the Surrogate's Court adhered to, with costs. Opinion by Jones, J. All concur except Cooke, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

Decided November 17, 1977

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* This pronouncement by the Supreme Court warrants this observation. This Court does not "reach or consider the challenge to the separate clause of our statute which requires that the paternity proceeding have been instituted 'during the pregnancy of the mother or within two years from the birth of the child' " because in this matter no order of filiation was made during the lifetime of the father (see slip opn, p 2, n 1). Nevertheless, it is difficult to ignore the fact that under our statutory scheme a public welfare official may institute a proceeding within 10 years of the birth of the child (Family Court Act, § 517, subd [b]) for purposes of requiring the father to provide support, and yet the order of filiation emanating from such proceeding would not allow the child to inherit from his or her father unless said proceeding was instituted within two years of the birth of the child (EPTL, 4-1.2, subd [a], par [2]; see *Matter of Flemm*, 85 Misc2d 855, 862).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1115

In the Matter of the Petition of

ROBERT M. LALLI,

Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

to render and settle her account as Administratrix.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York as Intervenor on behalf of the constitutionality of EPTL 4-1.2(a),

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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LOUIS J. LEFKOWITZ, Attorney General of the State of New York as Intervenor on behalf of the constitutionality of EPTL 4-1.2(a),
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

The appellee, Attorney General of the State of New York, appearing *pro se* on behalf of the constitutionality of the New York Estates, Powers & Trusts Law, § 4-1.2, subd. (a) paragraph 2, pursuant to Rule 16 of the Rules of this Court, respectfully moves that this appeal be dismissed for want of a substantial federal question or that the judgment below be affirmed.

Opinions Below

The original opinion of the Court of Appeals of the State of New York is published at 38 N.Y. 2d 77 (1975). A subsequent opinion of the Court of Appeals of the State of New York following a remand by this Court is published at 43 N.Y. 2d 65.

The decision of the New York Court of Appeals on remand can be found in Appendix "A" of the Jurisdictional Statement. The opinion of the Surrogate's Court, Westchester County, the court from which this case arose, is not officially reported but can be found in Appendix "B" of the Jurisdictional Statement.

Jurisdiction

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statute Involved

Estates, Powers & Trusts Law § 4-1.2(a) is reproduced at p. 3, Jurisdictional Statement.

While subdivision (b) is also reproduced at p. 4, Jurisdictional Statement, such subdivision is not now before this Court in that subdivision (b) has nothing to do with the factual situation at bar or the nature of the claim made by the appellant.

Statement of the Case

The appellant seeks to declare unconstitutional a section of the Estates, Powers & Trusts Law of the State of New York, *i.e.*, § 4-1.2(a). An application had been made by the appellant, Robert M. Lalli, in the Surrogate's Court of Westchester County for a compulsory accounting by the

administrator of the estate of Mario Lalli. Robert M. Lalli claimed to be an illegitimate offspring of Mario Lalli and therefore claimed to be a distributee of Mario's estate.

The Surrogate's Court, Westchester County, dismissed the application on the ground that under the Estates, Powers & Trusts Law, § 4-1.2(a), the appellant was not a distributee.

The Court of Appeals of the State of New York on two separate occasions reviewed the constitutionality of the statute at bar and found on each occasion that the statute was constitutional. The second review was following a remand by this Court. While the Attorney General of the State of New York was not a party to the original determination in the Surrogate's Court, Westchester County, or the Court of Appeals of the State of New York when it first heard the case, the Attorney General of the State of New York was permitted to intervene as a party by the New York State Court of Appeals following this Court's remand and the Attorney General participated in the proceedings before the Court of Appeals on the remand.

For the purpose of this appeal there are no factual disputes. The appellant at no time was ever judicially determined to be the son of Mario Lalli. There was no judicial proceeding for such a determination and no order of filiation was ever entered.

In this regard it should be noted that Robert M. Lalli, the appellant, was born on August 24, 1948. The decedent, Mario Lalli, died on January 7, 1974. At no time prior to Mario Lalli's death did Robert M. Lalli attempt to have himself judicially declared to be the son of Mario Lalli.

The Attorney General of the State of New York does not concede that Robert M. Lalli is in fact the son of Mario Lalli, nor does the Attorney General of the State of New

York concede that there was a formal acknowledgement by the decedent for the purposes of establishing kinship and rights of distribution that Robert M. Lalli was his son.

Apparently, Mario Lalli did execute a form during his lifetime giving his permission for Robert M. Lalli to marry at a time when Robert M. Lalli was an infant and his natural mother was already dead and could not execute a consent. What the intentions of Mario Lalli in signing this form were are only speculative. He may have been doing a boy a favor since no one was available and to consider the execution of this form an acknowledgement of paternity is to speculate beyond rational comprehension.

However, the execution of this form giving permission for Robert M. Lalli to marry is neither relevant nor dispositive of the true and simple issue involved in this case.

EPTL § 4-1.2(a) requires an order of filiation be obtained during the lifetime of the putative father. This was not done in the case at bar. The only question now presented to this Court is whether this Court should hold such a rational requirement of the New York State Legislature to be unconstitutional.

It should be noted that the statutory requirement that the order of filiation be obtained within two years from the birth of the child is not under consideration since there was no attempt to obtain an order of filiation during the putative father's lifetime and further because the New York courts have not applied the two-year provision of the statute and have traditionally held that as long as the order of filiation is obtained during the lifetime of the alleged putative father, it is sufficient.

Argument

Appellant has failed to raise any substantial question as to the constitutionality of New York's Estates, Powers & Trusts Law, § 4-1.2 subd.(a) paragraph 2.

A.

The determination of this Court in *Labine* v. *Vincent*, 401 U.S. 532 (1971) which left to each state the right to impose statutory restrictions with regard to inheritance by illegitimates, is controlling.

The appellant improperly relies on *Trimble* v. *Gordon*, 430 U.S. 762, as a basis for seeking a reversal of the determination by the New York Court of Appeals, 38 N.Y. 2d 77, 43 N.Y. 2d 65 (*supra*).

It is respectfully submitted that the Illinois statute declared unconstitutional by the Supreme Court of the United States and EPTL § 4-1.2 previously held constitutional by this Court are in no way similar. The Illinois statute, § 12 of the Illinois Probate Act, made no provision whatsoever for an illegitimate to inherit from its natural father except under the very limited circumstances of where the natural parents intermarry and where the natural father then acknowledges his parentage of the child. On the other hand, the statute provided that an illegitimate child could inherit from its natural mother.

This Illinois statute did not concern itself with proof of parentage but rather provided for inheritance only from the mother without considering whether an illegitimate child was in fact a natural child of the father and whether such fact could be established.

EPTL § 4-1.2 on the other hand makes no distinction with regard to the right of inheritance of an illegitimate child from its natural mother or father.

EPTL § 4-1.2 does not limit the right of a child to inherit from its natural father and allows that right to exist side by side with the right to inherit from the natural mother.

The distinction in EPTL § 4-1.2 does not deal with the right to inherit but only with the manner in which the parentage itself is established.

There are obvious physiological differences which create by their very nature certain problems in determining whether any given man is the father of a child as opposed to some other man.

This Court in deciding *Trimble, supra,* recognized this fact and acknowledged that "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for legitimate children claiming under their mothers' estates or for legitimate children generally." (45 L.W. 4397.) It was this very difficulty which this Court recognized as requiring a more demanding standard for illegitimate children claiming under their fathers' estates which the New York State Legislature in passing EPTL § 4-1.2 considered. The result of the legislators' consideration was the statutory requirement that there be a judicial determination of paternity during the lifetime of the alleged illegitimate's father.

Certainly it is not beyond the scope of legislative province to require a judicial finding of parentage with regard to an alleged putative father during his lifetime so that he might reasonably have an opportunity to contravene the contention of parentage.

This reasonable requirement represents a legitimate legislative purpose to avoid the perpetration of fraud on the People of this state with regard to the disposition of property passing intestate.

The New York Court of Appeals in deciding this case recognized the legitimate purpose of EPTL § 4-1.2 and the fact that this statute did not discriminate or violate the equal protection provisions of either the New York State Constitution or the Constitution of the United States.

It is respectfully submitted that the New York statute in question and the courts of this State have given adequate consideration to the statute's proper objective of

assuring accuracy and efficiency in the disposition of property at death, something which apparently was not done by either the Legislature or courts of the state of Illinois and that the New York statute is, as required by this Court, "carefully tuned to alternative considerations."

In this regard it is important to note that had the appellant in the *Trimble* case, *supra,* been a resident of the State of New York and had she made her claim under the New York statute now before this Court, she could have been successful in establishing her right to inherit. The illegitimate had, in Illinois, obtained an order of the Illinois court during the putative father's lifetime determining paternity and determining which putative father was indeed the father of the illegitimate.

Such an order under EPTL § 4-1.2 would have allowed the illegitimate to inherit from her father since no distinction is made in New York between the right of an illegitimate to inherit from either its mother or father once the paternity of the father is established in a judicial proceeding.

Under the Illinois statute which the Supreme Court of the United States declared unconstitutional, the illegitimate, although judicially determined to be the natural daughter of the putative father, was not entitled to inherit since an illegitimate under Illinois law could only inherit from its natural mother except in one specific case which required two affirmative acts on the natural father's part. The Attorney General is mindful of the fact that in the case at bar the alleged putative father executed a consent for the illegitimate, who was then under age, to marry and that that consent might be construed as an acknowledgment of paternity. The Attorney General is also not unmindful of footnote 14 in the decision of the Supreme Court of the United States in *Trimble* v. *Gordon, supra.*

However, a careful reading of the entire opinion of this Court in the *Trimble* case, *supra,* does not lead to the con-

clusion that a state in the exercise of its right to control the distribution of property by inheritance cannot require a judicial proceeding as the only basis for establishing paternity of an alleged father provided, of course, that once such putative father is so established there is no discrimination with regard to the right to inherit from either the natural mother or father.

Of course, if a state were to so choose, it could accept a "formal acknowledgement of paternity" as a basis for establishing paternity in the case of an illegitimate. However, it is respectfully submitted that there has not nor can there be any constitutional mandate which would require a state to accept such a formal acknowledgment as a basis for establishing paternity for the purpose of determining a right to inherit. A man may acknowledge paternity for many reasons without regard to any consideration of inheritance rights. In the case at bar, for example, the document giving consent for the alleged illegitimate child to marry may have been executed purely for convenience purposes since the child's natural mother was dead and no one else was available to give the consent necessary.

The Legislature of this State has determined that for inheritance purposes, a judicial proceeding to determine paternity be required and such a determination by the Legislature is reasonable and consistent with their legislative function to protect the interests of the citizens of this State.

So long as the legislative requirement with regard to proof is a reasonable one and so long as once the requirements of proof are made there is no discrimination between inheritance from a natural mother or natural father, the statute which provides for the standard of proof must be deemed constitutional.

The Attorney General respectfully urges that this Court's determination in *Trimble* v. *Gordon, supra,* is

limited on its facts to the peculiar statute in Illinois declared unconstitutional. Since the Illinois statute bears no relationship to the New York statute which clearly provides a constitutional framework with regard to inheritance by illegitimates, the determination by this Court in the *Trimble* case, *supra,* should not affect the holdings of the New York Court of Appeals in the case at bar.

B.

Although the New York Court of Appeals in its two decisions does not refer to the legislative history of EPTL § 4-1.2, that history is indeed specific in its expression of a purpose to mirror by statute the presumed intention of the community with regard to the disposition of property at death. EPTL § 4-1.2 was enacted by the Legislature on the basis of the study and recommendation of the Bennett Commission on Estates (4th Report, Temporary State Comm. on the Modernization, Rev. and Simplification of Laws on Estates, N.Y. Legis. Doc. 1965, No. 19, pp. 233-271).

The State has a responsibility to provide for the orderly devolution of property. There would be insurmountable practical problems involved in meaningful notice to illegitimates in order that procedural due process and finality of decrees and title to property might be achieved.

Within the perimeters of *Trimble* v. *Gordon,* this Court recognized that:

> "The orderly disposition of property at death . . . is a matter particularly within the competence of the individual States . . . and, even when constitutional violations are alleged, those courts [i.e. federal courts] should accord substantial deference to a State's statutory scheme of inheritance."

Neither the overall decision of this Court in *Trimble, supra* (whether liberally or narrowly read), nor any other

pronouncement of this Court, furnishes any authority for the proposition that EPTL § 4-1.2 is unconstitutional.

The New York statute does not contain unequal discrimination between any classes of illegitimates nor are there any insurmountable burdens with regard to its compliance. It is a procedural statute whose purpose is to see that the interests of all of the people of the State are protected with regard to the determination of property ownership.

It emanates from a careful analysis of the practical and procedural problems of illegitimate succession and falls clearly within this Court's mandates set forth in *Labine* v. *Vincent,* 401 U.S. 532 (1971), *supra.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or the judgment affirmed.

Dated: New York, New York
February 22, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Appellee *Pro Se*
on behalf of the constitutionality
of EPTL 4-1.2

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IRWIN M. STRUM
Assistant Attorney General
of Counsel

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1115

IN THE MATTER

OF

The Petition of ROBERT M. LALLI,

Appellant,

to compel

ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

to render and settle her account as Administratrix.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

BRIEF OF THE APPELLANT

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

—0—

BRIEF OF THE APPELLANT

Opinions Below

The majority and minority opinions (5 to 2) of the Court of Appeals on reconsideration ordered by this Court, *Matter of Lalli,* 431 U.S. 911 are reported at 43 N.Y. 2d 65 (Jurisdictional Statement, No. 77-1115, Appendix A, pp. A1-A9), dissent commencing at p. 70. The prior opinion of the Court of Appeals is reported at 38 N.Y. 2d 77 (Jurisdictional Statement No. 75-1142, Appendix A, pp. A1-A7).

The opinion of the Surrogate's Court of Westchester County is not reported. (Jurisdictional Statement, No. 77-1115, Appendix B, pp. B1B-10).

Jurisdiction

The judgment of the Court of Appeals of New York, affirming the decree of Surrogate's Court of Westchester County which dismissed the petition for compulsory accounting and upheld the constitutionality of Section 4-1.2 of Estates, Powers and Trusts Law, upon remand for further consideration ordered by this Court was entered on November 17, 1977. Notice of Appeal was filed on January 6, 1978. The Jurisdictional Statement was filed in this Court on February 8, 1978. On March 20, 1978, probable jurisdiction was noted.

The jurisdiction of the Court to hear this appeal is conferred by Title 28, United States Code, § 1257(2).

Constitutional Provision and Statute Involved

Constitutional Provision

United States Constitution, Amendment XIV,

> "§ 1. Citizenship rights not to be abridged by states
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Statute

Estates, Powers and Trusts Law § 4-1.2, 17B. McKinney's Consolidated Laws of New York, 531-532:

> "§ 4-1.2 *Inheritance by or from illegitimate persons*
>
> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).
>
> (4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.
>
> (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father

inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

Other Material Statutes

The juxtaposition of the above quoted statute with the other pertinent statutes, reflecting the public policy of New York additionally emphasizes the discrimination:

"1. Estates, Powers and Trusts Law § 5-4.4, 17B, McKinney's Consolidated Laws of New York, 932, as amended by 1975-1976 Pocket Part, page 146:

§ 5-4.4 *Distribution of damages recovered*

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the

surrogate of the county in which letters were issued....

"2. Estates, Powers and Trusts Law § 4-1.1, 17B, McKinney's Consolidated Laws of New York, 476-477, as amended by 1975-1976 Pocket Part, pages 70-71:

§ 4-1.1 *Descent and distribution of a decedent's estate*

The property of a decedent not disposed of by will, after payment of administration and funeral expenses, debts and taxes, shall be distributed as follows:

(a) If a decedent is survived by:

(1) A spouse and children or their issue, money or personal property not exceeding in value two thousand dollars and one-third of the residue to the spouse, and the balance thereof to the children or to their issue per stirpes.

(2) A spouse and only one child, or a spouse and only the issue of one deceased child, money or personal property not exceeding in value two thousand dollars and one-half of the residue to the spouse, and the balance thereof to the child or to his issue per stirpes....

"(b) If the distributees of the decedent are in equal degree of kinship to him, their shares are equal.

(c) There is no distribution per stirpes except in the case of the decedent's issue, brothers or sisters and the issue of brothers or sisters.

(d) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(e) Distributees of the decedent, conceived before his death but born alive thereafter, take as if they were born in his lifetime.

(f) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(g) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

"3. Family Court Act § 517, 29A, Part 1, McKinney's Consolidated Laws of New York, 249:

§ 517. *Time for instituting proceedings*

(a) Proceedings to establish the paternity of the child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after the lapse of more than two years from the birth of the child, unless paternity has been acknowledged by the father in writing or by furnishing support.

(b) If the petitioner is a public welfare official, the proceeding may be originated not more than ten years after the birth of the child.

"4. Family Court Act § 417, 29A, Part 1, McKinney's Consolidated Laws of New York, 146:

§ 417. *Child of ceremonial marriage*

A child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of

this article regardless of the validity of such marriage.

"5. Domestic Relations Law § 24, 14, McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part, 28:

§ 24. *Effect of marriage on legitimacy of children*

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.

2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this act shall take effect or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding."

Question Presented

Does Estates, Powers and Trusts Law § 4-1.2, providing that an illegitimate child is the legitimate child of his father only if an order of filiation is issued in a proceeding

instituted in the lifetime of the father during pregnancy of the mother or within two years from the birth of a child in juxtaposition with other pertinent statutes reflecting public policy of New York, violate Equal Protection and Due Process Clauses of Amendment XIV to the Constitution of the United States, in its application to a child, born out of wedlock, whose natural parents prior or subsequent to the birth of such child have not entered into a civil or religious marriage nor have consummated a common law marriage, and for whom no order of filiation was entered, and who was acknowledged by the deceased father as his son in a writing acknowledged before a notary and partially supported by his father, in preventing such child from sharing in his father's intestate estate or proceeds of recovery in a wrongful death action against the confessed murderer of his father?

Statement

The decedent, Mario Lalli, was murdered on January 7, 1974. (Appendix, pp. A7, A28) He was married to Rosamond Lalli, the administratrix and appellee, about 34 years (Appendix, p. A7). Robert M. Lalli, the appellant, and his sister, Maureen Lalli, were born respectively on August 24, 1948 and March 19, 1950, to the decedent and Eileen Lalli, who predeceased him (Appendix, pp. A15, A16). Robert M. Lalli, the appellant, was acknowledged by the decedent as "my son" in a certificate of consent to his marriage in a writing duly acknowledged before a notary (Appendix, p. A14) and was supported by the decedent (Appendix, pp. A11-A12, A17), who even bought a house "for Renee, his son Bobby, Renee's son Billy, and the other child that they were expecting" (Appendix, p. A26). The appellant also worked for his father, the decedent herein, and was paid for such work by checks (Appendix, p. A12); so when the decedent was murdered, the appellant lost not only his father, but his financial support and means of livelihood as well.

There are no factual disputes. The Court of Appeals in its original opinion, 38 N.Y. 2d 77, 79 stated:

> "It was not contested that during his lifetime the decedent had provided financial support for both appellant and his sister. Additionally it appeared that when appellant wished to be married in April, 1969 parental consent was required because he was then under age 21. Incident to the granting of such consent the decedent had acknowledged that appellant was his son in a writing sworn to before a notary public * * * "

The appellant, Robert M. Lalli, and his sister, Maureen Lalli are natural children, born out of wedlock, and no order of filiation was ever entered. (Appendix, pp. A3, A8)

There is no claim that prior or subsequent to the birth of those children their natural parents have entered into a civil or religious marriage, or have consummated a common law marriage.

On August 26, 1974, Robert M. Lalli, the appellant, filed a petition seeking a compulsory accounting and although the appellee originally answered, she thereafter served a notice of motion to dismiss on October 1, 1974 on the ground that under Estates, Powers and Trusts Law § 4-1.2 the appellant was not a distributee. The appellant opposed the application on the ground that the statute violated Equal Protection and Due Process Clauses of the XIVth Amendment and New York State Constitution, thus raising the federal question sought to be reviewed. The Surrogate

granted the motion upholding the statute by the decree entered November 26, 1974 (Jurisdictional Statement, No. 77-1115, Appendix D, pp. D1-D2). The Court of Appeals affirmed by the final judgment entered November 25, 1975. This Court vacated said judgment and remanded for further consideration in light of *Trimble* v. *Gordon,* 430 U.S. 762 (1977). (*Matter of Lalli,* 431 U.S. 911.) On remand the Court of Appeals adhered to its prior decision by final judgment entered November 17, 1977, in a 5 to 2 decision. This Court noted probable jurisdiction on March 20, 1978.

POINT I

Estates, Powers and Trusts Law § 4-1.2 is unconstitutional under Amendment XIV for failure to adopt a middle ground between the extremes of complete exclusion and case by case determination of paternity in the light of *Trimble* v. *Gordon*, 430 U.S. 762.

This Court vacated prior judgment of the Court of Appeals, 38 N.Y.2d 77 (Jurisdictional Statement No. 75-1148, Appendix C, pp. C1-C3) and remanded this case for further consideration in light of *Trimble* v. *Gordon,* 430 U.S. 762. It is significant therefore what was said in that case:

> "We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The Court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the

> orderly settlement of estates or the dependability of titles to property passing under intestate laws. Because it excludes these categories of illegitimate children unnecessarily, § 12 is constitutionally flawed." (430 U.S. 762, 770-771).

In addition, this Court clearly indicated acceptable guidelines, saying:

> "Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the State's interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity (430 U.S. 772N. 14)"

In our case the fact pattern fits into the guidelines for we have an acknowledgement of paternity in writing duly acknowledged before a notary. (Appendix, p. A14)

The real question faced by the New York Judges on reconsideration was whether our case of an illegitimate son acknowledged as son in a writing duly acknowledged came within the orbit of *Trimble* v. *Gordon,* 430 U.S. 762 or could be distinguished from it.

The gist of *Trimble* v. *Gordon,* 430 U.S. 762, 767, 770-773, 774, is:

> " * * * Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than

strictest scrutiny,' Lucas also establishes that the scrutiny 'is not a toothless one,' id., at 510, 96 S.Ct., at 2764, a proposition clearly demonstrated by our previous decisions in this area.

" * * * The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinoiis Supreme Court gave inadequate consideration to the relation between Sec. 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, Sec. 12 is constitutionally flawed.

"The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are

alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

"The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area. Our previous decisions demonstrate a sensitivity to 'the lurking problems with respect to proof of paternity,' Gomez v. Perez, 409 U.S. 535, 538, 93 S. Ct. 872, 875, 35 L.Ed.2d 56 (1975), and the need for the States to draw 'arbitrary lines . . . to facilitate potentially difficult problems of proof,' Weber, 406 U.S., at 174, 92 S.Ct., at 1406. 'Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.' Gomez, 409 U.S., at 538, 93 S.Ct., at 875. Our decision last Term in Mathews v. Lucas, supra, provides especially helpful guidance.

"In Lucas we sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits. One of the statutory conditions of eligibility was dependency on the deceased wage earner. 427 U.S., at 498, and n. 1, 96 S.Ct., at 2758. Although the Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court upheld the statutory classifications, finding them 'reasonably related to the likelihood of dependency at death.' Id., at 509, 96 S.Ct., at 2764. Central to this decision was the finding that the 'statute does not broadly discriminate between legitimates and illegitimates without more,

but is carefully tuned to alternative considerations.' Id., at 513, 96 S.Ct., at 2766.

"Although the present case arises in a context different from that in Lucas, the question whether the statute 'is carefully tuned to alternative considerations' is equally applicable here. We conclude that Sec. 12 does not meet this standard. Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. The facts of this case graphically illustrate the constitutional defect of Sec. 12. Sherman Gordon was found to be the father of Deta Mona in a state court paternity action prior to his death. On the strength of that finding, he was ordered to contribute to the support of his child. That adjudication should be equally sufficient to establish Deta Mona's right to claim a child's share of Gordon's estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances. 14 The reach of the statute extends well beyond the asserted purposes. See Jimenez v. Weinberger, 417 U.S. 628, 637, 94 S.Ct. 2496, 2502, 41 L.Ed.2d 363 (1974).

"* * * The Illinois Supreme Court also noted that the decedents whose estates were involved in the consolidation appeals could have left substantial parts of their estates to their illegitimate children by writing a will. * * *

"* * * By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the

essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. * * *

"* * * The opinion in Reed gives no indication that this available alternative had any constitutional significance. We think it has none in this case."

This Court in addition gave some illustrations of what it had in mind by stating in a footnote 14 the following:

"14. Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The states, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." (430 U.S. 772)

We respectfully submit that the significance of *Trimble* v. *Gordon*, 430 U.S. 762 is that an illegitimate child has under Amendment XIV the same right to inherit as a legitimate child subject to proof of paternity, but in our case there can be no question as to paternity for same is clearly conceded. Matter of *Estate of Lalli*, 38 N.Y.2d 77, 79 (Jurisdictional Statement No. 75-1148, Appendix A, pp. A2-A3).

The New York majority attempts to distinguish our case from the Illinois statute on latter's:

"* * * requirement that the family relationship be 'legitimatized' by the subsequent marriage of the

parents. Thus, there was a manifested and impermissible hostility to illegitimacy as such, unrelieved even if there were no doubt whatsoever as to paternity. The Supreme Court held unacceptable such a statutory provision which penalized children born of an 'illegitimate relationship' between their parents —concluding that the sins of the parents are not to be visited upon their children. There is nothing similar in our statute; it is concerned only with proof of paternity and the establishment of a blood relationship between the father and the child.

"In another aspect we note that even with respect to the issue of paternity there is a different emphasis in the two statutes. Illinois requires in a conclusory form only that the child be 'acknowledged by the father as the father's child.' New York, on the other hand, is evidently concerned not only with the fact of paternity but with the form and manner, and thus the availability, of its proof, i.e., by order of filiation." *Matter of Lalli,* 43 N.Y.2d 65, 68, (Jurisdictional Statement No. 77-1115, Appendix A, pp. A2-A3)

But the learned New York majority were closing their eyes, refusing to recognize and completely ignoring the argument of the appellant that a New York Statute, Domestic Relations Law § 24, 14 McKinney's Consolidated Laws of New York, 1975-1976 Pocket Part 28 (This Brief, p. 7) makes legitimate as to both natural parents a child:

> "* * * heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common law marriage * * *

> notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void * * *"

Thus under the plain wording of the New York statute a child born out of wedlock for whom no order of filiation was entered but whose parents went through a marriage ceremony no matter how tainted, no matter how criminal, i.e. bigamous, would by virtue of that marriage ceremony be rendered legitimate without an order of filiation.

We respectfully submit that, therefore, there is no distinction between the laws of New York and Illinois in deference to a marriage ceremony. New York, in their eagerness to compel marriage, gives greater rights on the one hand to offspring whose natural parents committed bigamy, apparently on the theory that a greater rascal is the father, the better for his issue; and on the other hand interposes an impenetrable barrier of order of filiation during lifetime of the father, where there is no marriage, no matter how improper.

Illinois, where there is a marriage, pays some attention to a proof of paternity, requiring an acknowledgment of paternity. § 12 of the Illinois Probate Act, provides:

> "* * * An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate";

but New York apparently dispenses with any proof of paternity in such a case, substituting a marriage ceremony for a proof of paternity, without providing any other guide lines. If anything, a comparison of the limitation in the last 40 words of subparagraph (a)(2) commencing with the word "if" of Estates, Powers and Trusts Law § 4-1.2 (This Brief, p. 3) with Domestic Relations Law

Sec. 24 (This Brief, p. 7) clearly reveals in the former an even more invidious discrimination than that which led this Court to flaw the Illinois statute in *Trimble* v. *Gordon,* 430 U.S. 762. See Point II of this brief, pp. 23-27.

We agree with the New York majority that Fourth Report of Commission on Estates, State of New York, Legislative Document 1965 No. 19, pp. 176-204 suggesting amelioration with some safeguards of the harsh rule of *nullius filius* is not relevant as showing New York public policy underlying Estates, Powers and Trusts Law, § 4-1.2 in the light of New York public policy revealed by Domestic Relations Law, § 24. Unfortunately, New York did not go far enough as to some illegitimates.

However, New York legislature was not ignorant of acknowledgment and support in dealing with children born out of wedlock. Family Court Act, § 517 (This Brief, p. 6), imposes a bar to paternity proceedings

> "after the lapse of more than two years from the birth of the child, *unless paternity has been acknowledged by the father in writing or by furnishing support.*" (Emphasis by us)

This Court, in *Trimble* v. *Gordon,* 430 U.S. 762, in note 14 said, in part:

> "* * * Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity * * *";

but the juxtaposition of Estates, Powers and Trusts Law, § 4-1.2 (This Brief, p. 3) on the one hand, and Domestic Relations Law, § 24 (This Brief, p. 7) together with Family Court Act § 417 (This Brief, p. 6) and

§ 517 (This Brief, p. 6) particularly the portion quoted above on the other hand clearly shows that the requirement of order of filiation during the lifetime of the father is far in excess of those "carefully tuned to alternative considerations," *Trimble* v. *Gordon,* 430 U.S. 762, 767, 770-773, 774.

This Court, in *Dunn* v. *Blumstein,* 405 U.S. 330, 347 said:

> "* * * At the outset, the State is faced with the fact that it must defend two separate waiting periods of different lengths. *It is impossible* to see how both could be 'necessary' to fulfill the pertinent state objective. *If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one-year period cannot also be justified as 'necessary' to achieve the same* purpose. * * *" (Emphasis by us)

Thus, there is a New York Legislative Declaration that an acknowledgment in writing by a father is sufficient to eliminate the time limitation bar. This declaration in effect brands denial of right to inherit to illegitimates acknowledged in writing by a deceased father as "invidious discrimination", for legislature having determined that an acknowledgment by a father in writing was sufficient proof of paternity for some purposes, the state could not require more for the right to inherit.

Incidentally in our case we have both acknowledgment in writing (Appendix, p. A14) and support. (Appendix, pp. A11-A12, A17).

Judge Cooke in a dissent joined by Judge Fuchsberg in the Court of Appeals (43 N.Y.2d 65, 70-73) says:

> "Admittedly, the Illinois statute recently declared unconstitutional by the Supreme Court of the United

States is significantly different from the New York statute (EPTL 4-1.2, subd [a], par [2]). Nevertheless, it is respectfully submitted that our statute is likewise unconstitutional in light of *Trimble* v. *Gordon* (430 U.S. 762). * * *

"Applying the equal protection analysis employed by the Supreme Court in *Trimble* necessitates consideration of the relation of our statute to our State's 'proper objective of assuring accuracy and efficiency in the disposition of property at death' (430 U.S., at p 770). Of course, our statute is not mindless nor totally irrational and a concern for a solid proof of paternity is a legitimate State purpose. But if the court is now required to put teeth into its scrutiny, we are obliged to go beyond the purpose of the statute to a consideration of the rationality of the burden it places on the State's illegitimate children.

"A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, *ipso facto*, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often result simply from the fact that the putative father is supporting and acknowledging the children as his own. Or, it might well be and often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order

will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.

"The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Ct Act, § 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in the eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of *Trimble* it must be concluded that the statute leaves the 'middle ground' of what a State may legitimately require and settles on the side of complete exclusion.

"In *Trimble,* the Supreme Court reasoned that a paternity order obtained for purposes of requiring the father to provide support should be sufficient to establish paternity for purposes of allowing an illegitimate child to inherit from a father who dies in-

testate (see 430 U.S., at p. 772)* However, the court did not suggest that this is the only method for making this determination. Our statute considers no alternatives and imposes a *sine qua non* requirement that an order of filiation be obtained during the lifetime of the father (EPTL 4-1.2, subd [a] par [2]) for this reason, in light of *Trimble* our statute fails to pass constitutional muster. * * *" (Jurisdictional Statement No. 77-1115, Appendix A, pp. A5-A9)

The problem of children born out of wedlock has proliferated in recent times due to the advent of modern morality, living together without benefit of clergy, and the pill. The *Miami Herald* (Florida) of March 31, 1978, p. 2A, says in part:

"* * * the trend of couples living together without marriage. An estimated one million such couples are on the American scene * * *".

The number of such children has reached large numbers. Typical of this increase are the statistics of the New York City Department of Health showing that 30.2% of all infants born in New York City in 1976 were illegitimate, an increase from 6.7% in 1956, and 14.8% in 1966. During the same 20-year period ending in 1976, out-of-wedlock births in New York City have nearly tripled, while legitimate births were cut in half. (*New York Times,* September 29, 1977.) The law should respond to their needs:

"* * * In this perpetual flux, the proble[illegible] which confronts the judge is in reality a two fold one: * * * he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die. * * *" *Benjamin N. Cardozo, The Nature of the Judicial Process,* p. 28:

See also *Eckel* v. *Hassan,* 61 A.D.2d 13, 18, where it was said in part

"* * * continuing surge in the courts to ameliorate the hitherto invidious discrimination directed against 'illegitimate' children claiming through a putative father * * *"

It is respectfully submitted, therefore, that § 4-1.2 of the Estates Powers and Trusts Law "is constitutionally flawed" "because it it excludes those categories of illegitimate children unnecessarily. *Trimble* v. *Gordon,* 430 U.S. 762, 770-773."

POINT II

Absence of a marriage of the natural parents in our case in juxtaposition of New York statutes proves discrimination and bias of § 4-1.2 of the Estates Powers and Trusts Law.

In its two opinions the Court of Appeals refused to take notice and completely ignored the argument of the appellant that a marriage was a missing fact in our case creating invidious discrimination when various provisions of the New York statutes are compared.

Under § 4-1.2 of the Estates Powers and Trusts Law a child to inherit from his natural father is required to have an order of filiation secured during the lifetime of the father or be forever barred from participating in the estate. At least that is the impression created by the two opinions of the Court of Appeals, 38 N.Y.2d 77 (Jurisdictional Statement No. 75-1148, Appendix A pp. A1-A7) and 43 N.Y.2d 65 (Jurisdictional Statement No. 77-1115, Appendix A pp. A1-A5) but is that the true situation under the provisions of New York Statutes?

The appellant on both occasions attempted unsuccessfully to call to the attention of that Court that the major premise assumed by the Court of Appeals has no foundation in fact for § 4-1.2 of the Estates Powers and Trusts Law does not apply to all children born out of wedlock, but only to *some* of them, and that such fact in and of itself constitutes denial of equal protection of the law under Amendment XIV and is discrimination.

Domestic Relations Law § 24 expressly provides that

> "a child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage * * * is the legitimate child of both natural parents * * *" (This Brief p. 7)

and to gild the lily to compel a marriage even more, even if a crime results, the New York Legislature added the words:

> "* * * notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void. * * *" See also Family Court Act § 417 (This Brief, p. 6).

The New York majority attempts to distinguish our case from *Trimble* v. *Gordon,* 430 U.S. 762 as showing no hostility to illegitimate or undue preference to those illegitimates whose natural parents went through a marriage ceremony, but the court must have had a tongue in cheek in view of the above quoted statutes on which it failed and refused to comment.

It is worthy of note that although Illinois statute requires in addition to a marriage "who is acknowledged by the father", New York statute provides no guide lines for any proof of paternity, substituting the claim of marriage for proof of paternity no matter how nebulous.

We respectfully submit that our statute just as the Illinois "statute was enacted to ameliorate the harsh common law rule under which an illegitimate child was *filius nullius* and incapable of inheriting from anyone", *Trimble* v. *Gordon,* 430 U.S. 762. *See Fourth Report State of New York Commission on Estates* 176-203, and that same rule should apply for New York just as Illinois and that both did not go far enough.

Thus New York statutes when taken together create two categories of children born out of wedlock, on one hand are placed such whose natural parents entered into a marriage as to whom a marriage is substituted for proof of paternity, and on the other hand are placed such as in our case, where a requirement of an order of filiation in lifetime of father erects an "insurmountable barrier" no matter the strength of the proof of paternity.

This court in *Jimenez* v. *Weinberger* 417 U.S. 628, 635-637 (1974) dealt with a similar situation in another context.

> "From what has been outlined it emerges that afterborn illegitimate children are divided into two subclassifications under this statute. One subclass is made up of those (a) who can inherit under state intestacy laws, or (b) who are legitimated under state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage. These children are deemed entitled to receive benefits under the Act without any showing that they are in fact dependent upon their disabled parent. The second subclassification of afterborn illegitimate children includes those who are conclusively denied benefits because they do not fall within one of the foregoing categories and are not entitled to receive insurance benefits under any other provision of the Act.

"We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimates in appellants' subclass, as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses. * * *

" * * * Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is 'overinclusive' in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is 'underinclusive' in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this

record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment. Schneider v. Rusk, 377 US 163, 168, 12 L Ed 2d 218, 84 S Ct 1187 (1964); Bolling v. Sharpe, 347 US 497, 499, 98 L Ed 884, 74 S Ct 693 (1954)."

We respectfully submit that § 4-1.2

"because it excludes those categories of illegitimate children unnecessarily . . . is constitutionally flawed." *Trimble* v. *Gordon*, 430 U.S. 762.

POINT III

The appellant is entitled to an accounting by administratrix as to wrongful death action.

The decedent has been murdered " * * * by the confessed killer, William Lalli * * * " (Appendix, p. A28). The appellant having been supported by the decedent at the time of his death (Appendix, pp. A11-A12, A17) regardless of the right of the appellant to participate in the distribution of the estate he had a right to participate in the proceeds of a wrongful death action and to an accounting for same from the respondent.

In *Holden* v. *Alexander*, 39 App. Div. 2d 476, 336 N.Y.S. 2d 649, 651, 655, the court said in part:

"EPTL 5-4.4 states, *inter alia*, that an action may be maintained to recover damages for wrongful death

by 'the personal representative, duly appointed in this state * * * *who is survived by distributees.* (Emphasis added) Pursuant to subdivision (a) of EPTL 5-4.4, the damages recoverable in such an action are solely for the benefit of the distributees of the decedent who are determined by reference to EPTL 4-1.1 which governs the order of inheritance in intestacy. * * *

"* * * In furtherance of the above findings, EPTL 4-1.2 (subd. [a], par. [2], and subd. [b]) is hereby declared unconstitutional *as applied and limited* to the specific facts of the case at bar (see Prudential Ins. Co. v. Hernandez, *supra*), as setting up an invidious discrimination between legitimates and illegitimates by requiring that an order of filiation be entered before an illegitimate or its father may be treated as a distributee of the other * * *

"To hold otherwise would seem not only to create a windfall for tortfeasors who happen to be fortunate enough to have committed their tortious acts against illegitimates (Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441, *supra*), but also to render a gross injustice to this particular plaintiff, who would have suffered a wrong without being provided any remedy."

This decision is in accord with the prior rulings of this Court as to the distribution of proceeds of a wrongful death action to children born out of wedlock: *Glona* v. *American Guarantee & Liability Insurance Company* (1968), 391 U.S. 73; *Levy* v. *Louisiana* (1968), 391 U.S. 68; and *Weber* v. *Aetna Casualty & Surety Company* (1972), 406 U.S. 164.

New York Legislature in deference to those decisions has since amended Estates, Powers and Trusts Law by adding § 5-4.5 to give a right to proceeds of death action to such as the appellant and this statute was given retroactive effect in *Eckel* v. *Hassan,* 61 A.D. 2d 13.

Yet, although the appellant had a right to an accounting at least to the extent of the proceeds of the wrongful death action or to be compensated for the neglect to secure same, the Court of Appeals completely ignored the contentions in this respect, just as it ignored POINT II, *supra.*

POINT IV

The discrimination against the appellant is a denial of due process to him.

We submit that the same argument as to Equal Protection applies equally to Denial of Due Process.

POINT V

The judgment should be reversed with costs, § 4-1.2 declared unconstitutional and an accounting decreed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1115

In the Matter of the Petition of ROBERT M. LALLI,

Appellant,

to compel ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,

Appellee,

to render and settle her account as Administratrix.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York as Intervenor on behalf of the constitutionality of EPTL 4-1.2(a),

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE APPELLEE, NEW YORK STATE ATTORNEY GENERAL

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relation to the illegitimate child. In every case this would reduce the distributive share of any legitimate children. It would defeat, entirely, the succession rights of parents and siblings of the intestate parent.

As a further practical consideration neither the Bennett Commission, nor the Legislature, could make the presumption that putative fathers desired such children to inherit from them to the same degree as legitimate children.

The putative father may never even have been aware of the existence of the illegitimate child. If so aware, he may be totally disinterested because of the lack of familial ties with the child. Most often the putative father is made aware of the illegitimate child as an unwilling participant in a paternity proceeding.

The prime objective of the Bennett Commission was to liberalize, as practically as possible, the rights of illegitimates to inherit from their putative fathers. In so far as the procedural problems, discussed *infra,* were concerned an "order of filiation" was a duly recorded event on record with the court and available to all personal representatives of a deceased putative father.

Furthermore, the practical considerations were not as pressing to the Bennett Commission as the procedural problems.

If an illegitimate is made an unconditional distributee in intestacy he must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent, yet not named a beneficiary, or, in probating the will of any person who makes a class disposition to "issue" of such parents, the illegitimate must be served with process. (New York Surrogate's Court Procedure Act § 1403). The complexities of citing and serving an illegitimate of whose existence neither family nor personal representative are aware could be insurmountable.

Of greatest concern is how does a New York Court achieve finality of decree of "any" estate when the possibility exists, however remote, that an illegitimate child may be alive. Finality in decrees is essential in the Surrogate's Courts due to the passage of title to real property under such decrees and the great number of intestate estates passing through the New York courts. New York procedural statutes and the due process clause mandate notice and opportunity to be heard to all necessary parties. If illegitimates are given the right to intestate succession *all* illegitimates would have to be served with process. This does not create a real problem where "known" illegitimates are involved, but, it presents the utmost burdens as regards "unknown" illegitimates. The Bennett Commission felt that this procedural problem might affect a majority of New York estates. See: *Matter of Flemm,* 85 Misc. 2d 855 (Surr. Ct. Kings Co. 1975).

The statute in question, by requiring as an absolute, a judicial "order of filiation" permits the illegitimate to inherit from his "unwilling" father. Paternity proceedings are invariably instituted only when the putative father is unwilling to recognize or support the child.

There are, however, many "willing" fathers who acknowledge and support the child without the necessity of compulsory judicial orders.

As Surrogate Sobel stated in *Matter of Flemm,* 85 Msc. 2d 864:

> "It seems therefore anomalous that the statute permits inheritence from the 'unwilling' father but not from the 'willing' father. Many states recognize such public holding out, acknowledgements in writing and furnishing of support as proof of paternity entitling the illegitimate to inherit. To recognize such proof however, invites postmortem litigation, i.e. assertions of paternity after putative father is dead and when he is not available to counter such proof."

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STATUTES

OTHER CITATIONS

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In the Matter of the Petition of ROBERT M. LALLI,

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to compel ROSAMOND LALLI, as Administratrix of the Estate of MARIO LALLI, Deceased,

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to render and settle her account as Administratrix.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York as Intervenor on behalf of the constitutionality of EPTL 4-1.2(a),

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE APPELLEE, NEW YORK STATE ATTORNEY GENERAL

Opinions Below

The opinion of the Court of Appeals on reconsideration ordered by this Court, *Matter of Lalli,* 431 U.S. 911, is reported at 43 N Y 2d 65, 400 NYS 2d 761, 371 NE 2d 481. The prior opinion of the Court of Appeals is reported at 38 N Y 2d 77, 378 NYS 2d 351, 340 NE 2d 721.

The opinion of the Surrogate's Court of Westchester County is not reported.

Jurisdiction

The jurisdiction of this Court to hear this appeal is conferred by Title 28, United States Code, § 1257(2). This Court noted probable jurisdiction on March 20, 1978.

Statute Involved

Estates, Powers and Trusts Law § 4-1.2(a) 17B McKinney's Consolidated Laws of New York, 531-531 is reproduced at page 3 of appellant's brief.

While subdivision (b) is also reproduced at page 3 of appellant's brief, such subdivision is not now before this Court in that subdivision (b) has nothing to do with the factual situation at bar or the nature of the claim made by the appellant.

Question Presented

Does EPTL § 4-1.2(a) meet the Constitutional requirements as defined by this Court?

The Attorney General of the State of New York respectfully submits that the statute is constitutional as found on two occasions by the New York Court of Appeals and further that the statute is rationally intended to protect the interests of all the citizens of New York with regard to descent and distribution.

Statement of the Case

The appellant seeks to declare unconstitutional a section of the Estates, Powers & Trusts Law of the State of New York, i.e., § 4-1.2(a). An application had been made by the

appellant, Robert M. Lalli, in the Surrogate's Court of Westchester County for a compulsory accounting by the administrator of the estate of Mario Lalli. Robert M. Lalli claimed to be an illegitimate offspring of Mario Lalli and therefore claimed to be a distributee of Mario's estate.

The Surrogate's Court, Westchester County, dismissed the application on the ground that under the Estates, Powers & Trusts Law, § 4-1.2(a), the appellant was not a distributee.

The Court of Appeals of the State of New York on two separate occasions reviewed the constitutionality of the statute at bar and found on each occasion that the statute was constitutional. The second review was made following a remand by this Court. While the Attorney General of the State of New York was not a party to the original determination in the Surrogate's Court, Westchester County, or the Court of Appeals of the State of New York when it first heard the case, the Attorney General of the State of New York was permitted to intervene as a party by the New York State Court of Appeals following this Court's remand and the Attorney General participated in the proceedings before the Court of Appeals on the remand.

For the purpose of this appeal there are no factual disputes. The appellant at no time was ever judicially determined to be the son of Mario Lalli. There was no judicial proceeding for such a determination and no order of filiation was ever entered.

In this regard it should be noted that Robert M. Lalli, the appellant, was born on August 24, 1948. The decedent, Mario Lalli, died on January 7, 1974. At no time prior to Mario Lalli's death did Robert M. Lalli attempt to have himself judicially declared to be the son of Mario Lalli.

The Attorney General of the State of New York does not concede that Robert M. Lalli is in fact the son of Mario Lalli, nor does the Attorney General of the State of

New York concede that there was a formal acknowledgement by the decedent for the purposes of establishing kinship and rights of distribution that Robert M. Lalli was his son.

Apparently, Mario Lalli did execute a form during his lifetime giving his permission for Robert M. Lalli to marry at a time when Robert M. Lalli was in law an infant and his natural mother was already dead and could not execute a consent. What the intentions of Mario Lalli in signing this form were are only speculative. To consider the execution of this form an acknowledgement of paternity is to speculate beyond rational comprehension.

But it is clear that the execution of this form giving permission for Robert M. Lalli to marry is neither relevant nor dispositive of the true and simple issue involved in this case.

EPTL § 4-1.2(a) requires that an order of filiation be obtained during the lifetime of the putative father. This was not done in the case at bar. The only question now presented to this Court is whether this Court should hold such a rational requirement of the New York State Legislature to be unconstitutional.

It should be noted that the statutory requirement that the order of filiation be obtained within two years from the birth of the child is not under consideration since there was no attempt to obtain an order of filiation during the putative father's lifetime and further because the New York courts have not applied the two-year provision of the statute and have held that as long as the order of filiation is obtained during the lifetime of the alleged putative father, it is sufficient. Examples of this type of judicial modification can be found in such cases as: *Matter of Thomas,* 87 Misc. 2d 1033 (Surr. Ct. N.Y. Co. 1976); *Matter of Flemm,* 85 Misc. 2d 855 (Surr. Ct. Kings Co. 1975).

POINT I

This Court in *Labine* v. *Vincent,* 401 U.S. 532, left each state free to impose statutory restrictions, strict or liberal, on the rights of illegitimates to inherit, thus disposing of inquiry by the courts as to the constitutionality of these statutes and the determination in *Trimble* v. *Gordon,* 430 U.S. 762, does not mandate EPTL 4-1.2 to be unconstitutional.

This Court in *Labine* v. *Vincent,* 401 U.S. 532 (1971) left each state free to impose statutory restrictions, strict or liberal, on the rights of illegitimates to inherit, thus disposing of inquiry by the courts as to the constitutionality of these statutes.

In *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961) Mr. Chief Justice Warren stated that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," and in *McDonald* v. *Board of Education,* 394 U.S. 802, 809 (1969) Mr. Chief Justice Warren further stated that "[l]egislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent and their statutory classifications will be set aside only if no grounds can be conceived to justify them".

EPTL § 4-1.2 was enacted into law by the N.Y. Legislature effective September 1, 1966. This statutory choice was made by the legislature on the recommendation of the Bennett Commission on Estates (Fourth Report [1965] pp. 233-271).

In 1971 this Court, speaking through Justice Black, said that "The Federal Constitution does not give this Court the power to overturn the State's choice [of rules for intestate succession] under the guise of constitutional interpretation because the Justices of this Court believe they

can provide better rules. *Labine, supra,* 401 U.S. 532, 537. *Trimble* v. *Gordon,* 430 U.S. 762 (1977), however, now demands "more than the mere incantation of a proper state purpose". 430 U.S. 769. In short, the constitutional analysis of the statute must be complete.

In view of the recent adoption by this Court of a three tier analytical review of alleged equal protection violations as demonstrated in *Trimble supra,* the New York statute stands alone and not in juxtaposition to any other state statutes. The statute at bar is grounded in practical and procedural considerations rising well above the standards now mandated by this Court under the "minimal scrutiny" test or that middle ground between rational basis and compelling state interest.

New York's Estates, Powers and Trusts Law, Section 4-1.2, subdivision a, paragraph 2 (hereinafter EPTL § 4-1.2, subd. [a], par. [2]) affords an illegitimate child the right to inherit from his putative father simply on furnishing proof that a court of competent jurisdiction has made an order of filiation declaring paternity made during the lifetime of the father.*

A careful review of the eleven cases prior to *Trimble,* see 430 U.S. 766 fn. 11, illustrates that the New York statute does not deprive illegitimates in the manner proscribed by this Court.

The statute before this Court does not confer or deny any specific rights to or from illegitimate children that legitimate children have. Cf. *Matthews* v. *Lucas,* 427 U.S.

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* The New York Court of Appeals did not reach the question or consider the challenge to the separate clause of the statute which requires that the paternity proceeding have been instituted "during the pregnancy of the mother or within two years from the birth of the child." (EPTL 4-1.2, subd. [a], par. [2]; 38 NY 2d 80 fn.) and since no attempt was made to obtain an order of filiation during the lifetime of the father, such provision is not now before this Court.

495 (1976) (Social Security Benefits); *Gomez* v. *Perez,* 409 U.S. 535 (1973) (support payments); *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972) (Workmen's Compensation Benefits); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (D.C. Md.), summarily aff'd, 409 U.S. 1069 (1972) (Social Security Insurance Benefits); *Levy* v. *Louisiana,* 391 U.S. 68 (1968) (wrongful death actions).

The New York Statute does not contain unequal discriminations between any classes of illegitimates. Cf. *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974) (Social Security Benefits: pre & post death illegitimates); *Beaty* v. *Weinberger,* 478 F. 2d 300 (CA 5 1973), summarily aff'd, 418 U.S. 901 (1974) (Social Security disability payments pre and post disability illegitimates).

There are no insurmountable burdens in complying with the New York Statute and the legislative intent, discussed *infra,* emanates from a careful analysis of practical and procedural problems of intestate succession. *Labine* v. *Vincent,* 401 U.S. 532, *supra* (intestate succession).

EPTL § 4-1.2, subd. [a], par. [2] requires only a court order of filiation during the lifetime of the father. Cf. *Trimble* v. *Gordon,* 430 U.S. 762 (1977) (intestate succession—filiation and marriage); *Matthews* v. *Lucas,* 427 U.S. 495 (1976) (Social Security insurance benefits—proof of dependency, etc.).

In reviewing the legislative history of the statute it is apparent that the New York statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. The Bennett Commission, all experienced Surrogates, estate practitioners and legislators, emphasized two major areas of concern; one practical and one procedural.

As a practical matter permitting an illegitimate child to unconditionally inherit from a parent can cut down the distributive share of a lawful surviving spouse having no

The Bennett Commission gave serious consideration to this problem and wrote:

> "The utmost caution should be exercised to protect innocent men from unjust accusation in paternity claims. To avoid such hazard no informal method of acknowledgement has been provided for in the recommendations. * * * The procedure in other states provided merely that any informal witnessed writing establishing the relationship of father and child between the deceased and the claimant is sufficient to establish paternity, allows paternity to be established after the death of the father, thus affording considerable opportunity for falsification of evidence and inviting harassing litigation." (pp. 266-267)

The Bennett Commission and resulting legislation has balanced the practical and procedural problems heretofore delineated and the unwanted threat of postmortem strike suits against the possibility of occasional injustice resulting to illegitimates.

Based on experience the members concluded that the "willing" father has numerous avenues under New York Law to care for the child and it may be presumed that if he did not during his lifetime then he did not desire the child to inherit from him.

The "unwilling" father's rights are protected by a court proceeding and the most minimal burden is placed upon the child.

The New York statute does not focus on legitimizing the family relationship by requiring a marriage. The Illinois statute before this Court in *Trimble, supra,* was significantly more burdensome, discussed *infra.* The New York statute is the most practical solution to a multi-faceted problem.

The practical and procedural problems discussed herein have been enmeshed into forthright legislation which

neither has the intention of visiting the sins of the parent on the child, nor, unequally depriving the illegitimate child to an extent which would render it unconstitutional.

EPTL § 4-1.2, subd. [a], par. [2] requires proof of paternity by judicial determination made during the lifetime of the father. This is not foreclosed by this Court's decision in *Trimble* v. *Gordon, supra,* nor is it proscribed by this Court through footnote 14 in *Trimble, supra,* 430 U.S. 722.

The determination of this Court in *Trimble* v. *Gordon,* 430 U.S. 762 (1977) does not mandate EPTL 4-1.2 to be unconstitutional.

It is readily apparent that the Illinois statute declared unconstitutional by this Court and EPTL 4-1.2 previously held constitutional by the Court of Appeals are in no way similar. The Illinois statute, § 12 of the Illinois Probate Act, made no provision whatsoever for an illegitimate to inherit from its natural father except under the very limited circumstances of where the natural parents intermarry and where the natural father then acknowledges his parentage of the child. On the other hand, the statute provided that an illegitimate child could inherit from its natural mother.

This Illinois statute did not concern itself with proof of parentage but rather provided for inheritance only from the mother without considering whether an illegitimate child was in fact a natural child of the father and whether such fact could be established.

EPTL 4-1.2 on the other hand makes no distinction with regard to the right of inheritance of an illegitimate child from its natural mother or father.

EPTL 4-1.2 does not limit the right of a child to inherit from its natural father and allows that right to exist side by side with the right to inherit from the natural mother.

The distinction in EPTL 4-1.2 does not deal with the right to inherit but only with the manner in which the parentage itself is established.

There are obvious physiological differences which create by their very nature certain problems in determining whether any given man is the father of a child as opposed to some other man.

This Court in deciding *Trimble, supra,* recognized this fact and acknowledged that "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." 430 U.S. 770. It was this very difficulty which this Court recognized as requiring a more demanding standard for illegitimate children claiming under their fathers' estates which the New York State Legislature in passing EPTL 4-1.2 considered. The result of the legislators' consideration was the statutory requirement that there there be a judicial determination of paternity during the lifetime of the alleged illegitimate's father.

Certainly it is not beyond the scope of legislative province to require a judicial finding of parentage with regard to an alleged putative father during his lifetime so that he might reasonably have an opportunity to contravene the contention of parentage.

This reasonable requirement represents a legitimate legislative purpose to avoid the perpetration of fraud on the People of this state with regard to the disposition of property passing intestate.

The New York Court of Appeals in deciding this case recognized the legitimate purpose of EPTL 4-1.2 and the fact that this statute did not discriminate or violate the equal protection provisions of either the New York State Constitution or the Constitution of the United States.

It appears irrefutably that the New York statute in question and the courts of New York have given adequate consideration to the statute's proper objective of assuring

accuracy and efficiency in the disposition of property at death, something which apparently was not done by either the Legislature or courts of the state of Illinois and that the New York statute is, as required by the Supreme Court of the United States, "carefully tuned to alternative considerations."

In this regard it is important to note that had the appellant in the *Trimble* case, *supra,* been a resident of the State of New York and had she made her claim under the New York statute now before this Court, she would have been successful in establishing her right to inherit. The illegitimate had, in Illinois, obtained an order of the Illinois court during the putative father's lifetime determining paternity and determining which putative father was indeed the father of the illegitimate.

Such an order under EPTL 4-1.2 would have allowed the illegitimate to inherit from her father since no distinction is made in New York between the right of an illegitimate to inherit from either its mother or father once the paternity of the father is established in a judicial proceeding.

Under the Illinois statute which this Court declared unconstitutional, the illegitimate, although judicially determined to be the natural daughter of the putative father, was not entitled to inherit since an illegitimate under Illinois law could only inherit from its natural mother except in one specific case which required two affirmative acts on the natural father's part. The Attorney General is mindful of the fact that in the case at bar the alleged putative father executed a consent for the illegitimate, who was then under age, to marry and that consent might be construed as an acknowledgment of paternity. The Attorney General is also not unmindful of footnote 14 in the decision of this Court in *Trimble* v. *Gordon, supra.*

However, a careful reading of the entire opinion in the *Trimble* case, *supra,* does not support any conclusion that

a State in the exercise of its right to control the distribution of property by inheritance cannot require a judicial proceeding as the only basis for establishing paternity of an alleged father provided, of course, that once such putative father is so established there is no discrimination with regard to the right to inherit from either the natural mother or father.

Of course, if a State were to so choose, it could accept a "formal acknowledgement of paternity" as a basis for establishing paternity in the case of an illegitimate. However, there has not nor can there be any constitutional mandate which would *require* a State to accept such a formal acknowledgment as a basis for establishing paternity for the purpose of determining a right to inherit. One may acknowledge paternity for many reasons without regard to any consideration of inheritance rights. In the case at bar, for example, the document giving consent for the alleged illegitimate child to marry may have been executed purely for convenience purposes since the child's natural mother was dead and no one else was available to give the consent necessary but it is not the acknowledgment of paternity required.

The Legislature of the State of New York has determined that for inheritance purposes, a judicial proceeding to determine paternity be required and such a determination by the Legislature is reasonable and consistent with their legislative function to protect the interests of the citizens of New York.

Otherwise stated, so long as the legislative requirement with regard to proof is a reasonable one and so long as once the requirements of proof are made there is no discrimination between inheritance from a natural mother or natural father, the statute which provides for the standard of proof must be deemed constitutional.

The determination in *Trimble* v. *Gordon, supra,* must be read as limited on its facts to the peculiar statute in

Illinois declared unconstitutional. Since the Illinois statute bears no relationship to the New York statute which clearly provides a constitutional framework with regard to inheritance by illegitimates, the determination by this Court in the *Trimble* case, *supra,* should not affect the holding of the Court of Appeals in the case at bar.

The New York statute, at the time of its enactment, was "carefully tuned to alternative considerations". The New York procedure of proof of paternity is "tailored to eliminate imprecise and unduly burdensome methods of establishing paternity". New York's concern is not only for the fact of paternity but the form and manner of its proof. As to the claim that the New York statute creates an insurmountable burden on the child, this argument is fallacious. See Amicus Brief, pp. 16-18.

> "In effect our statute requires that the determination of paternity be made in the formality of a judicial proceeding in consequence of which there will follow an order of filiation and a permanent, accessible record. If a father is prepared to execute a formal acknowledgment of paternity (a prerequisite which appears clearly to be acceptable to the Supreme Court), obtaining an order of filiation will not be burdensome." *Matter of Lalli,* 43 N Y 2d 65, .

The New York statute before this Court does not attempt to influence the actions of men and women by imposing sanctions on their illegitimate children.

However, assuming, *arguendo,* that a sanction is imposed on the children born of illegitimate relationships this Court stated in *Trimble, supra* at 771:

> "The orderely disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing

both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, *and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.*" 430 U.S. 771 (emphasis added).

POINT II

EPTL 5-4.5 permits an illegitimate child the right to recoup a portion of the proceeds of a wrongful death action.

EPTL § 5-4.1 confers the right to bring a wrongful death action on behalf of a decedent's estate on the duly appointed personal representative of the estate. EPTL § 5-4.5 permits an illegitimate child the right to recoup a portion of such proceeds in the case where the decedent is a putative father. The theory behind allowing such recoupment is the pecuniary loss to the illegitimate child. EPTL § 5-4.5 became effective July 1, 1975 but did not affect causes of action accruing prior to its effective date. The Appellate Division, Second Department recently held EPTL § 5-4.5 to be retroactive in effect. *Eckel* v. *Hassan,* 61 A D 2d 13 (Second Dept. 1978).

In view of the fact that EPTL § 5-4.1 permits the personal representative to maintain a wrongful death action within two (2) years of the decedent's death and such an action was never brought in the case at bar and the additional fact that EPTL § 5-4.5 permits illegitimates to share in a successful action, that part of appellant's brief addressing this point is moot.

The issue as to whether an illegitimate may share in the proceeds of a wrongful death action was never in this case and is not before the Court.

POINT III

***Amici's* Argument "C" alleging sex discrimination by operation of EPTL § 4-1.2 must be dismissed because no plaintiff has standing to make the instant constitutional challenge.**

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases and controversies. The requirement that plaintiffs have standing is part of that limitation. *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976). In order to establish standing, plaintiff must show "an injury to himself that is likely to be redressed by a favorable decision." *Id.* at 38. *See also, Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). The allegation of a "hypothetical burden" is not sufficient to create standing. *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583 (1972).

As this Court stated in *Warth* v. *Seldin,* 422 U.S. 490 (1975),

> "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of a 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Id.* at 508. (citation omitted).

As previously discussed, *supra,* EPTL § 4-1.2(a) does not deny the natural mother any substantive or procedural benefits granted to the putative father. Cf. *Frontiero* v. *Richardson,* 411 U.S. 677 (1973). Furthermore, EPTL § 4-1.2(a) is an intestate succession law dealing solely with the form and manner of proving paternity. The attenuated argument of *amici* that the natural mother is a stigmitized politically powerless victim of EPTL § 4-1.2 lacks credence and support by the facts of this case. In the case at bar, the natural mother of appellant is deceased. In fact the

natural mother predeceased the appellant's putative father. Cf. *Kahn* v. *Shevin,* 416 U.S. 351 (1973).

If no plaintiffs have standing to bring an action, it must be dismissed for lack of jurisdiction. *Warth* v. *Seldin,* 422 U.S. 490 (1975).

It is respectfully submitted that EPTL § 4-1.2, in no way, discriminates against the natural mother as the natural mother has the very same rights presently afforded the illegitimate child under the statute. The natural mother is not denied access to the courts of New York to prove paternity during the lifetime of the father nor is the illegitimate child. If the man is adjudged the natural father he is held to the same degree of responsibility for the child as the mother. Family Court Act § 513.

The Attorney General of the State of New York makes no excuse for the legislative wisdom EPTL § 4-1.2. This brief does not rely on statistics or generalities, *Craig* v. *Boren,* 429 U.S. 190 (1976), to substantiate the rationale for the right of New York to require a judicial proceeding to prove paternity.

If this Court allows appellant and *amici* to justify their argument by placing EPTL § 4-1.2 in juxtaposition to numerous other state statutes this Court would, in essence, be placed in the awkward position of reviewing every domestic relations statute in New York. EPTL § 4-1.2(a) is the only statute properly before this Court and New York has overriding and compelling interests in securing the familial ties of its citizens and in supervising proceedings (as under EPTL § 4-1.2) which may divest unknowing persons and their relatives of vested property interests.

POINT IV

The judgment should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1115

In the Matter of the Petition of
ROBERT M. LALLI,
Appellant,
to compel
ROSAMOND I LLI, as Administratrix of
the Estat of Mario Lalli, Deceased,
Appellee,
to rend r and settle her account
as Administratrix.

BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY AND LEGAL SERVICES FOR THE ELDERLY POOR IN SUPPORT OF APPELLANT.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT, AND STATEMENT OF INTEREST OF THE AMICI

The Legal Aid Society of New York City and Legal Services for the Elderly Poor respectfully move this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of the appellant Robert M. Lalli, by reason of the amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the evidentiary and constitutional issues presented herein.

1. Movant The Legal Aid Society is a private non-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance without cost to persons in New York City who are without adequate means to employ other counsel.

2. This appeal presents a constitutional question of far-reaching and fundamental importance to large numbers of the indigent persons in New York City whom it is the Society's purpose to serve, namely, the question of the constitutional rights of illegitimate children to inherit from their fathers by intestate succession.

3. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of persons who die intestate and their illegitimate offspring, and the constitutional question involved in this case is of great importance to illegitimate children who are concerned with establishing paternity so that they can inherit from their father's estates. As lawyers for the City's poor, The Legal Aid Society has long concerned itself with advancing,

in every appropriate forum, the legal rights of its clients. The Society's lawyers have considerable experience with the kinds of constitutional issues which are presented here, and, specifically, have substantial knowledge and experience concerning modes and methods of proof of paternity in the context which is at issue in the instant appeal.

4. Movant Legal Services for the Elderly Poor is funded by the Legal Services Corporation through Community Action for Legal Services and the United States Department of Health, Education and Welfare to provide assistance on research and litigation to lawyers dealing with the problems of the elderly. One of the many areas of concern to the elderly is estates and inheritance rights. Because the vast majority of the elderly poor die intestate, the laws governing

intestate succession are of concern to Legal Services for the Elderly Poor. The poor not only frequently die intestate, but also have only limited access to legal advice that could help them to know and understand, and therefore come within the terms of, the laws of intestate succession.

5. The constitutional question raised by the instant appeal, concerning the rights of illegitimate children to inherit from their fathers in intestacy, is one of central concern to Legal Services for the Elderly Poor in its efforts to fully assist in the litigation of issues that affect the poor. Attorneys with Legal Services for the Elderly Poor, in their experience with that office and in prior experience in other legal services organizations, have represented illegitimate children before this Court

in Jiminez v. Weinberger, 417 U.S. 628 (1974), and Trimble v. Gordon, 430 U.S. 762 (1977).

6. Movants The Legal Aid Society of New York City and Legal Services for the Elderly Poor were permitted to file a joint amicus curiae brief to the New York Court of Appeals upon its reconsideration of this case following its earlier remand from this Court.

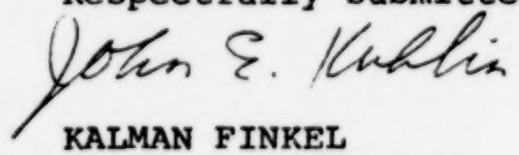
7. Movants have an obvious and immediate interest in the issue before this Court on this appeal. Counsel for appellant has consented to the filing of this brief amicus curiae. This motion is filed because counsel for the Attorney General of New York State, one of the appellees, has refused consent.

WHEREFORE, movants pray that the attached brief amicus curiae be per-

mitted to be filed with the Court.

Dated: New York, New York
May 1, 1978

Respectfully submitted,



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STATEMENT OF THE CASE

This case concerns the constitutionality, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, of New York Estates, Powers and Trusts Law (EPTL) section 4-1.2(a) in allowing illegitimate children to inherit by intestate succession from their mothers but not from their fathers, unless there has been a formal adjudication declaring paternity in a filiation proceeding instituted during the pregnancy of the mother or within two years from the birth of the child. More specifically, the question presented here is whether the State of New York may constitutionally refuse the appellant illegitimate child, Robert Lalli, inheritance from his natural father by intestate succession when it is undisputed that the appellant is the natural son of the

decedent, and that the decedent had participated in the baptism of the appellant as his father, provided financial support for appellant during his lifetime, orally acknowledged appellant as his own, and acknowledged that appellant was his son in a writing sworn to before a notary at the time he provided written parental consent for appellant's marriage.

In August, 1974, following the death of his father by homicide and the appointment of decedent's wife -- the appellee Rosamund Lalli -- as administratrix of his father's estate, appellant sought to compel a compulsory accounting by appellee-administratrix. The motion of the appellee-administratrix to dismiss the appellant's application was granted by the Surrogate's Court, Westchester County, on the ground that the appellant was not a distributee

under EPTL 4-1.2(a)(2). On direct appeal to the New York Court of Appeals that decision was affirmed, the Court finding no constitutional infirmities in EPTL 4-1.2(a). 38 N.Y.2d 77 (1975). On appeal to this Court, the judgment of the Court of Appeals was vacated and the case was remanded for further consideration in light of Trimble v. Gordon, 430 U.S. 762 (1977). On reconsideration, the New York Court of Appeals, with two judges dissenting, adhered to its previous decision (43 N.Y.2d 65), and this appeal followed.

SUMMARY OF ARGUMENT

In adhering to its prior decision adverse to the appellant herein, the majority of the New York Court of Appeals disregarded the constitutional principle announced by this Court in Trimble v. Gordon, 430 U.S. 762 (1977), that forms of proof of paternity which are not im-

precise and unduly burdensome, and in particular formal acknowledgment of paternity, must constitutionally be allowed by the state in proceedings to determine an illegitimate child's right to inherit from his deceased father by intestate succession. The effect of New York EPTL 4-1.2(a) in foreclosing consideration in such proceedings of written acknowledgment and other forms of proof of paternity which are commonly accepted in the courts of New York State violates the underlying principles of Trimble and as well amounts to unconstitutional sex discrimination.

ARGUMENT

IN A PROCEEDING TO ESTABLISH THE RIGHT OF AN ILLEGITIMATE CHILD TO INHERIT FROM HIS FATHER BY INTESTATE SUCCESSION, THE STATE OF NEW YORK CANNOT CONSTITUTIONALLY BAR CONSIDERATION OF ANY FORM OF PROOF OF PATERNITY WHICH IS NOT IMPRECISE AND UNDULY BURDENSOME, INCLUDING THE FULLY ADEQUATE AND UNDISPUTED PROOF PRESENTED BY THE APPELLANT.

A. Introduction

When viewed in light of the controlling constitutional principles set forth by this Court last Term in Trimble v. Gordon, 430 U.S. 762, 52 L.Ed.2d 31, the discrimination against illegitimate children in the distribution of the assets of their fathers who die intestate which is contained in New York EPTL 4-1.2(a) cannot withstand scrutiny under the requirements of the Equal Protection Clause of the Fourteenth Amendment. These important and controlling constitutional principles were largely ignored by the majority of the New York Court of Appeals in adhering to a decision adverse to the appellant on its reconsideration of this case.

In Trimble this Court stated that Labine v. Vincent, 401 U.S. 532 (1971), its "force as a precedent"

having been "limited" by "subsequent cases" (52 L.Ed.2d at 37 n.12), no longer constituted good authority for sustaining the constitutionality of statutory classifications affecting the distribution of assets upon death and based upon the status of illegitimacy. This Court concluded that such statutory classifications must henceforth be "examined ... more critically" for the strength of their relationship to legitimate and actual state purposes (52 L.Ed.2d at 37, 43 n.17). The Court further confirmed that a "State's purported interest in 'the promotion of [legitimate] family relationships'" cannot sustain the constitutionality of discrimination against illegitimates, since "we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children

born of their illegitimate relationships." 52 L.Ed.2d at 38-9. This Court also rejected the argument that statutes discriminating against illegitimate children in inheritance by intestate succession can be upheld on the theory that they mirror the presumed intentions of the citizens of the State regarding the disposition of their property at death: "[a]t least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of 'presumed intent.'" (52 L.Ed. 2d at 42 n.16). Trimble also held that the mere fact that the decedents whose estates are involved could avoid the statutory barrier to their illegitimate children's inheritance by writing a will to provide for them is without constitutional significance and cannot

justify the statutory exclusion (52 L.Ed.2d at 41-2).[1]

---

1. This Court's application in Trimble, to illegitimacy discrimination in the laws of intestate succession, of the principles and level of constitutional scrutiny that it had earlier applied to such discrimination in wrongful death actions (Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guaranty and Liability Insurance Co., 391 U.S. 73 (1968)), workmen's compensation benefits (Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)), and social security benefits (Jiminez v. Weinberger, 417 U.S. 628 (1974); Mathews v. Lucas, 427 U.S. 495 (1976)) vitiates the distinction earlier made by the Court below between "benefits and rights," on the one hand, and an "inchoate expectancy," on the other. Matter of Lalli, 38 N.Y.2d at 80-81. That distinction was grounded, at least in part, on this Court's earlier, now repudiated, divergence in Labine v. Vincent, 401 U.S. 532 (1971), from its general constitutional treatment of illegitimacy cases.

The central constitutional ruling of this Court in Trimble, and the principle which controls the outcome of the instant appeal, is that state statutes discriminating against illegitimate children in the area of intestate succession can pass constitutional muster under the Equal Protection Clause only if they are "carefully tuned to alternative considerations," so as to allow these illegitimate children the right to offer the courts any kind of evidence of paternity which the State cannot demonstrate to be "imprecise and unduly burdensome" (52 L.Ed.2d at 40-41, 41 n.14). This Court made it unmistakably clear that its holding in Trimble condemns the State's elimination of any form of proof of paternity which the State fails to demonstrate is "imprecise and unduly burdensome"

in light of the State's objective of "assuring accuracy and efficiency in the disposition of property at death" (52 L.Ed.2d at 40-41, 41 n.14). "[P]rior adjudication or formal acknowledgment of paternity," the Court held, are among the forms of proof which are "clearly" not "imprecise and unduly burdensome methods of establishing paternity" (52 L.Ed.2d at 41 n.14), and hence constitutionally must be accepted by the State in proof of paternity.

B. EPTL 4-1.2(a) Constitutes Unconstitutional Discrimination Against Illegitimate Children.

In adhering to its prior determination following this Court's remand of this case for reconsideration in light of Trimble, the majority of the New York Court of Appeals patently ignored the guiding constitutional principles enunciated by this Court in that case. Instead, in an opinion

bereft of careful analysis of the full meaning of the Trimble decision, the majority below summarily concluded that "our statute meets the constitutional guidelines articulated in Trimble" (43 N.Y.2d at 70). The majority utterly ignored its obligation under Trimble to delineate the boundaries of the types of proof of paternity which must constitutionally be considered in an intestacy proceeding, and abruptly dismissed the statement at footnote 14 of the Trimble decision which specifically included formal acknowledgments of paternity among those clearly acceptable forms of proof of paternity which a state must constitutionally allow.

As the dissenting judges in the court below correctly observed, the majority's facile distortion of the plain meaning of the Trimble de-

cision was plainly in error. Dissenting Judges Cooke and Fuchsberg prefaced their conclusion that the discrimination against illegitimate children enacted by EPTL 4.1-2(a) is unconstitutional with a careful and considered identification of the constitutional principles underlying and flowing from the Trimble decision. Thus Judge Cooke, quoting from Trimble, accurately identified this Court's requirement in that case that categories of illegitimate children whose "'inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws'" cannot constitutionally be excluded "'unnecessarily'" and that the applicable state statute must take account of the "'possibility of a middle ground'" in order

to accommodate those categories of illegitimate children. 43 N.Y.2d at 70-71. Judge Cooke then correctly concluded that the challenged New York statute fails to consider middle ground or alternative solutions, and as a consequence produces anomalous and inconsistent results that often work a severe injustice:

> A judicial proceeding may promote accuracy, but the difficulties in otherwise establishing paternity do not justify the narrow confines and procedure mandated by our statute. The requirement of an order of filiation made during the lifetime of the father will, ipso facto, exclude a substantial category of illegitimate children from inheritance. If this exclusion resulted from a lack of proof, it might be justifiable. But in reality not obtaining an order of filiation will often simply result from the fact that the putative father is supporting and acknowledging the children as his own. Or, it might well be and often is the product of

> carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer. Indeed, ordinarily the order will be obtained only where the natural father is not providing support. The children who are voluntarily supported, no matter how compelling the proof, will be absolutely barred if such an order is not obtained.
>
> The question of paternity is a delicate one. Even though the putative father may petition for the order (see Family Court Act, Section 522), this is a burdensome procedure. To require an order of filiation during the lifetime of the father is to demand, at least in eyes of laymen, a form of adversary proceeding. The instant matter is illustrative. The natural father was supporting petitioners, and had made an acknowledgment of his parenthood as to one of them. In this instance the only purpose served by an order of filiation would be to satisfy a requirement which may have provoked disharmony and which goes beyond what is necessary in these circumstances. To be sure, the State may desire this method of proof, but this is an extreme requirement

> in view of the consequences. The State may impose a heavy burden, but the statutory procedure required has only a tenuous relation to the quantum of proof demanded. Viewed in proper perspective, it is apparent that the statute places an undue, if not unyielding, burden on those concerned, and thus in light of Trimble it must be concluded that the statute leaves the "middle ground" of what a state may legitimately require and settles on the side of complete exclusion.

43 N.Y.2d at 71-72.

As the dissent reflects, no greater anomaly or more severe injustice flowing from the application of EPTL 4.1-2 (a) can be imagined than that worked by its impact upon the case of the appellant Robert Lalli. Solely by reason of the extreme and restrictive terms of EPTL 4.1-2(a), appellant is denied the right to inherit by intestate succession from the man who indisputably is his natural father and whose opportunity to specifically provide by will for his son upon his death was denied him by the homicide that unexpectedly ended his life. By reason of the statutory bar appellant was not permitted to establish paternity even though he indisputably proved that the decedent participated in appellant's baptism as his father, provided financial support for appellant during his lifetime, orally acknowledged appellant as his own child, and acknowledged that appellant was his son in a writing sworn to before a notary at the time he provided written parental consent for appellant's marriage. On the facts of appellant's case, such statutory discrimination is plainly unconstitutional.

By ignoring the ruling of this Court in Trimble that a state cannot constitutionally foreclose consideration in this setting of any form of proof of paternity which is not "imprecise and unduly burdensome," the majority below chose to close its eyes to the plain fact that the courts of New York State have customarily accepted a broad range and variety of kinds of evidence as adequate and reliable forms of paternity. Such allowable forms of proof have included evidence that the father has lived together with the mother and child at various locations and an admission in a letter of the parental relationship, Anon v. Anon, 25 A.D.2d 350 (2nd Dept. 1966), aff'd. 19 N.Y.2d 840 (1967), remittitur amended, 20 N.Y.2d 742 (1967); evidence that the father has lived together with the

mother and children, supported the children and paid their school tuition, together with a signed affidavit acknowledging paternity and the claiming of a child as a dependent on an income tax return, Brown v. White, 29 A.D.2d 1054 (3rd Dept. 1968); the father's signing of a hospital authorization for the infant child, Green v. Blue, 28 A.D.2d 628 (3rd Dept. 1967); testimony that the father and child lived together, Jay o/b/o X v. Y, 48 A.D.2d 716 (3rd Dept. 1975); the father's signing of the child's report card and his writing of a letter to obtain visitation, D. v. D., 69 Misc.2d 698 (Fam.Ct. N.Y. Cty. 1972); letters containing admissions and other testimony, White v. Grey, 26 A.D.2d 972 (3rd Dept. 1966); testimony of a third party, Kiamos v. Childakis,

25 A.D.2d 647 (1st Dept. 1966); an admission, Commr. ex. rel. Hoffman v. Scholtz, 279 App. Div. 967 (1st Dept. 1952); payments of support, People v. Guley, 281 App. Div. 927 (3rd Dept. 1953); testimony of a third party, Martin v. Lane, 57 Misc. 2d 4 (Family Ct. Dutchess Cty. 1968); and a written acknowledgment on a hospital form after birth of the infant, Fitzsimmons v. DeCicco, 44 Misc.2d 307 (Family Ct. Ulster Cty. 1964).

The kinds of evidence set forth above indisputably constitute forms of proof of paternity which are already well accepted by the courts of this State. In these courts such evidence must amount to "clear and convincing" and "entirely satisfactory" proof in order to establish paternity.

Burk v. Burpo, 75 Hun 568 (1894); Commissioner ex. rel. Gallagher v. O'Keefe, 180 App. Div. 667 (2d Dept. 1917); Commissioner ex. rel. Carr v. Kotel, 256 App. Div. 352 (1st Dept. 1939); Fitzsimmons v. DeCicco, 44 Misc.2d 307 (Family Ct. Ulster Co. 1964). Thus recently, the New York Surrogate's Court in Suffolk County held that two illegitimate children were entitled to inherit intestate from their deceased father where the evidence demonstrated that the decedent supported the children and orally acknowledged them as his own, listed them as dependents on his income tax returns, and was listed as the natural father of the children on birth and baptismal certificates, school records, insurance policies, and Veterans Administration records.

Citing this Court's decision in Trimble and Judge Cooke's "strong" dissenting opinion in the instant case, the Surrogate concluded that the petitioners there "have proven by clear and convincing proof that they are indeed the children of the decedent" and he therefore permitted them to inherit. Estate of Casper Abbati, New York Law Journal, December 30, 1977, page 11, col. 6 (Surrogate's Court, Suffolk County).

Therefore, in rejecting the constitutional guidelines enunciated in Trimble, the majority below perpetuated a statute which denies intestate inheritance rights to illegitimate children who are able to adduce forms of proof of paternity which in this State plainly do not constitute "imprecise and unduly

burdensome methods of establishing paternity."[2] Trimble, 52 L.Ed.2d at 41, 41 n.14. The inevitable conclusion, then, is that such forms of proof of paternity cannot, consistent with the principles of Trimble v. Gordon and the Fourteenth Amendment's Equal Protection Clause, automatically be eliminated by the State of New York as methods of establishing paternity in proceedings in which an illegitimate child seeks to inherit from his father by intestate succession.

---

2. Further, no argument could be made that the Surrogate's Court is an inappropriate forum for resolving the issue of paternity in the course of its proceedings to determine the rights of illegitimate children to inheritance in intestacy. See In re Estate of Ross, 67 Misc.2d 320 (Surrogate's Ct. Kings Cty., 1971); In re Ortiz Estate, 60 Misc.2d 303 (Surrogate's Ct. Kings Cty., 1969).

C. EPTL 4-1.2(a) Also Constitutes Unconstitutional Sex Discrimination.

As demonstrated above, EPTL 4-1.2 (a), like the Illinois statute struck down in Trimble, is unconstitutional because it irrationally discriminates against illegitimate children vis-a-vis legitimate children in determining rights to inherit from their fathers in intestacy. Thus far in this brief Amici have analyzed the results that constitutionally must flow from the invalidation of EPTL 4-1.2(a) on these grounds. These results can also be reached on the basis of an alternative constitutional approach.

Although this Court did not find it necessary to reach the issue in Trimble (52 L.Ed.2d at 36), Amici respectfully suggest that the statute in question here also constitutes unconstitutional sex discrimination, since it irrationally discriminates to an extreme degree against women who must support their illegitimate children following their fathers' deaths and against illegitimate children on the basis of the sex of the deceased parent from whom they seek to inherit by intestate succession. Under New York law, Family Court Act § 513, "[e]ach parent of a child born out of wedlock is liable for the necessary support and education of the child ..." Thus, when one parent dies, the surviving parent is solely liable to support the child. And yet, despite the clear economic disadvantage of surviving mothers (cf. Kahn v. Shevin, 416 U.S. 351, 353, 355 (1974)), EPTL 4-1.2 gives assistance to surviving fathers which it

denies to surviving mothers. Children whose mothers die can inherit from the estates of their mothers, thus potentially having funds for their support, whereas only a small proportion of children, those whose paternity has been previously adjudicated, can inherit from their fathers. The child's mother in many cases will therefore have the far more onerous task of supporting a child who has no claim against his/her father's estate, and the illegitimate child who cannot inherit from his/her father's estate will be economically disadvantaged. The New York statutory scheme discriminates against women and against their illegitimate children who cannot inherit from their fathers by failing to provide for these illegitimate children a legal right to

inheritance, without a prior Family Court paternity order, equivalent to that granted to the illegitimate children of surviving male parents. That discrimination is made especially egregious and unwarranted by the fact that an illegitimate child of a deceased mother is free to come into the New York Surrogate's Court to present all proof of his/her relationship to the mother, with no statutory restrictions, while an illegitimate child of a deceased father is not given <u>any</u> opportunity to be heard in the same Surrogate's Court unless there has been a Family Court adjudication of paternity.

Such extreme statutory discrimination against the illegitimate child and the surviving parent solely on the basis of the gender

of the decedent parent clearly cannot survive constitutional scrutiny under the standards of equal protection which are applicable to sex discrimination. That standard was recently enunciated by this Court in Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 407 (1976):

> To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in Reed [v. Reed, 404 U.S. 71 (1971)] the objectives of "reducing the workload on probate courts," id., at 76, 30 L.Ed. 2d 225, 92 S.Ct. 251, and "avoiding intra-family controversy," id., at 77, 30 L.Ed.2d 225, 92 S.Ct. 251, were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of intestate administrators. Decisions following Reed similarly have rejected administrative ease and convenience as sufficiently important objectives

> to justify gender-based classification.

As Justice Powell observed in his concurring opinion in Craig, 50 L.Ed. 2d at 4141 n.*, "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." Plainly, EPTL 4-1.2(a) must fall under that standard for unconstitutional sex discrimination, particularly in view of the effect of the statute in allowing the illegitimate child claiming from the mother's estate to introduce any evidence of maternity while foreclosing the illegitimate child claiming from the father's estate from any opportunity to prove paternity. Compare Jiminez v. Weinberger, 417 U.S. 628 (1974), with Mathews v.

Lucas, 427 U.S. 495 (1976). See Califano v. Goldfarb, ___ U.S. ___, 51 L.Ed.2d 270 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Stanley v. Illinois, 405 U.S. 645 (1972).

CONCLUSION

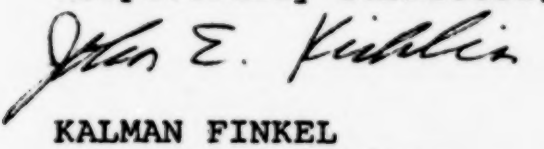
In Trimble v. Gordon, supra, this Court ruled that the Constitution requires that forms of proof of paternity which are not unduly imprecise and burdensome must be allowed in intestacy proceedings in which the issue of the right of the illegitimate child to inherit from his/her deceased father is raised. As has been demonstrated above, there are several forms of proof of paternity, or combinations thereof, which

in view of their routine acceptance in the courts of New York State are sufficiently reliable, precise, and nonburdensome that they must constitutionally be considered in intestacy proceedings. Whatever may be the reach of the constitutional principles set forth in Trimble, it is unquestionable that application of those principles to the instant case compels a ruling in favor of the appellant Robert Lalli, since the undisputed proof of paternity offered by him comes within this Court's explicit examples of forms of proof which cannot constitutionally be eliminated by the State. Therefore, it is respectfully submitted that this Court should declare EPTL 4-1.2 (a) unconstitutional and reverse the order of the New York Court of Appeals

which is appealed from.

Dated: New York, New York
May 1, 1978

Respectfully submitted,



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